(25,110)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 827.

WM. FILENE'S SONS COMPANY, PETITIONER,

vs.

CHARLES F. WEED, MILROY H. GIBSON, AND EDWARD B. WILSON, RECEIVERS OF WM. S. BUTLER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1914.

No. 1101.

WM. FILENE'S SONS COMPANY,
CLAIMANT, APPELLANT,

v.

CHARLES F. WEED ET AL., RECEIVERS,
APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

At a District Court of the United States begun and holden at Boston within and for the District of Massachusetts, on the second Tuesday of September, being the eighth day of said September, in the year of our Lord one thousand nine hundred and fourteen.

Before

THE HONORABLE JAMES M. MORTON, JR., *District Judge.*

No. 396, EQUITY DOCKET.

ISAAC McLEAN SONS COMPANY, COMPLAINANT,
v.
WILLIAM S. BUTLER & COMPANY, INCORPORATED,
DEFENDANT.

IN RE CLAIM OF WM. FILENE'S SONS COMPANY.

The Bill of Complaint in this cause was filed in the clerk's office on the seventh day of November, A. D. 1912, and was duly

entered at the September Term of this court, A. D. 1912, and is as follows:—

BILL OF COMPLAINT.

[FILED NOVEMBER 7, 1912.]

ISAAC McLEAN SONS COMPANY, a corporation organized and existing under the laws of the State of Maine, with its principal office at Portland in the State of Maine, a citizen and resident of the State of Maine, COMPLAINANT.

AGAINST

WILLIAM S. BUTLER & COMPANY, INCORPORATED, a corporation organized and existing under the laws of the State of Massachusetts, with its principal office at Boston in said District, a citizen and resident of Massachusetts, RESPONDENT.

Isaac McLean Sons Company, a citizen and resident of the State of Maine, which brings this bill in equity in behalf of itself and all other creditors of the respondent, a citizen and resident of the State of Massachusetts, complains as follows:—

1. That the respondent is now indebted to the complainant for work and materials performed and furnished by the complainant to the respondent in an amount of not less than twenty-five thousand dollars ($25,000), with interest thereon; that the said indebtedness is on open account and is now due and payable, with the exception of two (2) promissory notes, each for ten thousand dollars ($10,000), taken on account of a portion thereof, which are not yet due; that the greater part of said indebtedness is overdue, but though often demanded, all said indebtedness has remained wholly unpaid.

Upon information and belief, the complainant alleges as follows:

2. That the respondent is indebted to other persons and corporations to an amount approximating seven hundred thousand dollars ($700,000), said indebtedness consisting of merchandise indebtedness and obligations upon promissory notes due and to become due to banks and individuals, the payment of which to a large amount is now due and has been demanded.

3. The respondent is unable to meet its obligations and liabilities as they mature in the ordinary course of business, and attempts to collect said debts now due by legal proceedings are threatened and imminent. The complainant says that it might be

futile for it to pursue its ordinary remedies at law, and that it would be unjust and inequitable for it or other creditors to attempt to gain a preference over other creditors in the time or manner of settlement of their claims.

4. The respondent is engaged in the business of operating a retail dry goods store on the corner of Washington and Winter Streets in said Boston, and has invested very large sums aggregating more than two hundred and fifty thousand dollars ($250,000) in stocks of new and fresh merchandise which are immediately available for sale at a profit if the business is carried on without interruption, but which would have to be sold at great sacrifice if the business should be permitted to cease. The store occupied by the respondent has recently been fitted with new and expensive fixtures furnished by the complainant, which make it attractive to the purchasing public, and which are of great value to a going concern, but which would be of practically no value if sold apart from the business.

5. The respondent is lessee under a written lease of the premises which it occupies, expiring as to certain parcels on February 27, 1921, as to a certain other parcel on December 30, 1920, and as to a certain other parcel on December 30, 1918. Said lease provides that it may be terminated by the lessor if the lessee shall be declared bankrupt or insolvent, but that if a receiver is appointed of the lessee's property, the lease shall not be terminated upon that account unless the receiver is not discharged within ninety (90) days from the date of his appointment. Said lease is of great value to the respondent and would be of great value to any purchaser of its business as a going concern. If attachments should be placed upon the respondent's property and the respondent should thereupon be adjudicated a bankrupt, the value of said lease would be wholly lost to the creditors of the respondent.

6. The respondent and its predecessors, under the popular name of "Butler's Store", during many years of continuous business in Boston have built up a good-will of great value which would be almost wholly lost to the respondent and its creditors if the business should be permitted to cease.

7. The respondent is without sufficient cash, capital or quick assets to carry on its business, and is without adequate credit, and is unable to raise by loan or otherwise the money immediately needed for carrying on its business. Because of its lack of money and credit, it will be obliged immediately to close its store and sacrifice its assets unless a receiver is appointed and empowered to borrow money upon receiver's certificates.

8. That for the reasons hereinabove set forth the complainant is without adequate remedy for the collection of the indebtedness due to the complainant from the respondent as aforesaid without the intervention of a court of equity, and the appointment of a receiver to continue the business of the respondent and protect the value of its assets until sufficient sums can be realized, either from the continuance of the business or the sale of its assets, to discharge the indebtedness of the respondent or to distribute its assets so that all its creditors may share equitably therein.

Wherefore, the complainant prays that a receiver or receivers be forthwith appointed to take possession of the assets of the respondent and administer the same, with full power to manage and operate the property of the respondent, with authority to continue its business, employ agents and employees and, with the approval of the court, to borrow money and issue receiver's certificates therefor.

And the complainant further prays that its respective debt and the debts of all other creditors who join in these proceedings may be established, and that the assets of the respondent may be equitably applied as the court may direct in satisfaction thereof.

And the complainant prays that the respondent, its directors, officers, agents and all other persons may be restrained by injunction from interfering with or disposing of said property, or any part thereof, or any income or proceeds therefrom.

And the complainant prays for such further orders and relief as to this court may seem meet and proper.

ISAAC McLEAN SONS COMPANY,
by WILLIAM F. WHARTON,
Solicitor and of Counsel for Complainant.

COMMONWEALTH OF MASSACHUSETTS,

SUFFOLK, ss. BOSTON, November 7, 1912.

Then personally appeared, before me, G. S. R. McLean, treasurer of the complainant above named, who, being duly sworn, made oath that he had read the foregoing bill of complaint, and knew the contents thereof, and that the same is true to the best of his knowledge, excepting as to the matters therein stated on information and belief, and as to those matters, he verily believes them to be true.

Before me,

FREDERICK H. NASH,
Notary Public.

[SEAL]

On the same day the following Answer was filed : —

ANSWER OF THE RESPONDENT.

[FILED NOVEMBER 7, 1912.]

Now comes the respondent above named, and for answer to the bill of complaint respectfully avers that the matters and things stated in said bill of complaint are true.

Wherefore, this respondent submits its rights to the court, and prays that a decree may be made accordingly.

FREDERICK H. NASH,
Solicitor and of Counsel for the Respondent.

COMMONWEALTH OF MASSACHUSETTS,

SUFFOLK, ss. BOSTON, November 6, 1912.

Charles F. Weed, being duly sworn, deposes and says that he is the treasurer of the William S. Butler & Company, Incorporated; that he has read the bill of complaint and the foregoing answer, and knows the contents thereof, and that the allegations of the bill of complaint and of the answer are true to the best of his knowledge and belief.

CHARLES F. WEED.

Subscribed and sworn to, before me, this day of November, 1912.

FREDERICK H. NASH,
Notary Public.

Also on the same day the following Decree Appointing Charles F. Weed and Milroy H. Gibson, Receivers, was entered: —

DECREE APPOINTING RECEIVERS.

NOVEMBER 7, 1912.

COLT, J. On this seventh day of November, 1912, comes the complainant in this cause, by its attorneys, and upon consideration of the bill of complaint and the answer thereto, and on motion of counsel for the complainant, the respondent, by its attorney, consenting thereto, it is ordered, adjudged and decreed that Charles F. Weed, of Brookline, and Milroy H. Gibson, of Boston, both in Massachusetts, be, and they hereby are, appointed receivers of all the assets and property of the respondent, wheresoever situated, and the moneys, contracts, debts, choses in action, books of account, deeds and documents, belonging to the respondent or relating to or arising from its property or business; and they are directed to file with the clerk of this court within two days from this date their several bonds with surety or sureties, to be approved by the clerk, in the sum of fifty thousand dollars each. Said receivers are hereby authorized and directed to take into their possession forthwith all the assets and property of the respondent wheresoever situated, to carry on the business of the respondent until further order of the court, and for that purpose to purchase such materials and supplies, employ and pay such counsel, servants and agents, contract for such labor, and subject to the direction and approval of this court take such other steps and enter into such obligations and agreements as shall be reasonably necessary: to insure any property of the respondent which they may think proper; to collect and receive all sums due or payable to the respondent, or arising from the conduct of its business by the receivers; to pay any accrued rent for the preservation of leases; and under the direction of the court to institute and prosecute all such actions, suits and proceedings as they may think proper and for the protection and preservation of the respondent's assets or for recovering possession thereof; to defend any and all actions, suits and proceedings against the respondent or against the receivers

in respect of their acts or management as such; and out of the moneys to be received by them as aforesaid to pay all taxes and assessments lawfully laid or assessed upon or in respect of the property or business of the respondent, and all expenses and obligations properly incurred by them in carrying on the said business, or otherwise in connection with the premises. The said receivers shall deposit all moneys coming into their hands as aforesaid in some suitable bank or trust company in the city of Boston.

It is further ordered, adjudged and decreed that the respondent, its officers and agents, be, and they hereby are, restrained and enjoined, until further order of this court, from interfering with, transferring, encumbering, selling or disposing of any of the property of the respondent; and from taking or withholding possession thereof, or in any way interfering with the possession or management of any part of the said property or of the business of the respondent by the receivers hereby appointed, and from further conducting the business of the respondent or any part thereof, except through and under the receivers and their agents and employees.

By the Court,

CHARLES K. DARLING, *Clerk*.
by JOHN E. GILMAN, Jr., *Deputy Clerk*.

On the eleventh day of November, A. D. 1912, the following Order Requiring Proof of Claims was entered: —

ORDER REQUIRING PROOF OF CLAIMS.

NOVEMBER 11, 1912.

COLT, J. This cause came on to be heard upon the petition of the receivers, praying that an order be made fixing a time within which the claims of creditors against the estate and property of the respondent, William S. Butler & Company, Incorporated, in the hands of said receivers shall be filed and proved. And it being apparent that such order is expedient and necessary, it is ordered, adjudged and decreed that all creditors of William S. Butler & Company, Incorporated, the respondent herein, present their claims

made up as of November 7, 1912, verified by affidavit, to the receivers at their office at 451 Washington Street in the city of Boston, on or before January 1st, 1913, and that all persons or corporations whose claims are not presented in the manner and in the time herein specified shall be barred from participating in the distribution of the assets in the hands of the receivers under direction of this court, unless the court for good cause shall otherwise order.

And it is further ordered, adjudged and decreed that the receivers give notice of this order by publishing an attested copy thereof in the "Boston Herald", a newspaper published in the city of Boston, once each week for four successive weeks immediately following the entry of this order, and by mailing to all known creditors of the said respondent, at their addresses as shown on the receivers' books, a printed copy of this order.

By the Court,

CHARLES K. DARLING, *Clerk*.
by JOHN E. GILMAN, Jr., *Deputy Clerk*.

This cause was thence continued to the December Term, A. D. 1912, when the following Decree appointing Edward B. Wilson Co-Receiver was entered: —

DECREE APPOINTING CO-RECEIVER.

DECEMBER 3, 1913.

COLT, J. This cause came on to be further heard on the third day of December, 1912, and thereupon, on the suggestion of counsel for the receivers that a co-receiver be appointed, it is ordered and decreed that Edward B. Wilson, of Newton, be, and he is appointed co-receiver with Charles F. Weed and Milroy H. Gibson of the assets and property of William S. Butler & Company, Incorporated, Gilchrist Company, Everybody's Store, Incorporated, Bosworth Manufacturing Company, and Everybody's Co-operative Grocery Store, Incorporated, that he shall have the same powers and duties as are granted to said Weed and Gibson and imposed upon them by virtue of the decrees hereinbefore entered on Novem-

ber 7th, 11th and 12th, respectively, and that he shall file a bond, with surety or sureties, approved by the clerk of this court, in the same amount for each of said companies that each of said receivers has filed for said companies, respectively.

By the Court,

CHARLES K. DARLING, *Clerk.*

At the same term, the following Petition of Wm. Filene's Sons Company was filed:—

PETITION OF WM. FILENE'S SONS COMPANY TO RE-ENTER AND TERMINATE LEASE FOR BREACH OF CONDITION.

[FILED DECEMBER 9, 1912.]

Respectfully represents Wm. Filene's Sons Company:—

1. On or about May 29th, 1912, your petitioner leased to the respondent, William S. Butler & Company, Incorporated, certain premises situated on Washington Street, Winter Street and Jackson Place, in the city of Boston, for a term of years which began on or about September 3, 1912, and was to continue as to all of said premises until December 30, 1918, and as to the greater part for a longer term. Said William S. Butler & Company, Incorporated, accepted said lease and entered into possession of the premises on or about September 3, 1912, and continued in possession thereof until the appointment of the receivers of said William S. Butler & Company, Incorporated, by this Honorable Court in the above-entitled cause on November 7, 1912, since which date said receivers have been in occupation thereof.

2. By the terms of said lease there became due and payable to your petitioner on December 1, 1912, on account of the rental reserved in said lease, and the other payments therein required to be made, for the month of November, 1912, the sum of thirteen thousand one hundred and thirty-two and ninety-six one-hundredths (13,132.96) dollars, exclusive of a certain further sum due the petitioner for insurance on fixtures in said premises.

3. On or about December 2, 1912, the receivers appointed by this Honorable Court paid to the petitioner checks amounting in

the aggregate to thirteen thousand one hundred and thirty-two and and ninety-six one-hundredths (13,132.96) dollars, and notified the petitioner that said receivers had not then elected to affirm or disaffirm said lease, and that in case said receivers should elect to disaffirm said lease the petitioner might apply said payment on account of the obligation of the receivers for use and occupation of the premises from November 7, 1912, the date of their appointment. No other payment was or has been paid to or received by the petitioner in or towards satisfaction of the rent and other payments due under said lease on December 1, 1912, as aforesaid.

4. On December 5, 1912, said receivers notified the petitioner in writing of their election not to affirm or assume or become in any way responsible for said lease, and of their intention to vacate the premises as soon as convenient and until they so vacate the premises to pay for use and occupation of said premises since November 7, 1912, such reasonable amount, including therein the sums already paid to the petitioner as above set forth, as may be agreed upon or fixed by this Honorable Court.

5. Said lease provides among other things that upon failure to perform or observe any of the covenants, agreements, terms or conditions therein contained the lessor may immediately or at any time thereafter enter into and upon the premises or any part thereof in the name of the whole and repossess the same as of its former estate; and that upon such entry as aforesaid the lease shall be determined. By reason of the failure to pay said rent and other payments for the month of November as above set forth there has been such a default and the petitioner is by the terms of the lease entitled to re-enter and terminate said lease as therein provided.

6. The petitioner is desirous of re-entering upon said premises and terminating said lease for breach of the condition as above set forth, in order that it may be in a position to negotiate for such disposition of the demised premises as will be most advantageous and will cause the least loss; but the petitioner is willing, notwithstanding such re-entry, that said receivers shall continue their occupation of the premises for such reasonable time as they may desire.

Wherefore your petitioner prays:

1. That this Honorable Court will make an order authorizing the petitioner forthwith or at any time hereafter while said default continues to re-enter upon said premises or any part thereof, in name of the whole, and repossess the same as of its former estate, as in said lease provided, the petitioner undertaking hereby to permit the receivers thereafter to continue in occupation of said premises in the same manner as if no such re-entry had been made.

2. For such other relief as to this Honorable Court shall seem meet.

WM. FILENE'S SONS COMPANY,
by BRANDEIS, DUNBAR & NUTTER, *its Attorneys.*

On the same day, the following Order was entered on the foregoing petition: —

ORDER ON PETITION TO WM. FILENE'S SONS COMPANY.

DECEMBER 9, 1912.

COLT, J. The petition of Wm. Filene's Sons Company for permission to re-enter upon certain property leased by it to William S. Butler & Company, Incorporated, now occupied by the receivers appointed herein, having been presented and considered and it appearing that said receivers do not object to the allowance of said petition:

It is ordered that said Wm. Filene's Sons Company be permitted to exercise any power of re-entry contained in the lease of said premises and thereby to terminate said lease for any default now existing in the performance of the terms and conditions of said lease and for that purpose to repossess themselves of said premises, but that said Wm. Filene's Sons Company shall thereafter permit said receivers for a reasonable time, or until the further order of this court, to occupy said premises in the same manner and on the same terms as if no such re-entry had taken place.

By the Court,

CHARLES K. DARLING, *Clerk.*

At the same term, to wit, December 17, 1912, it was ordered by the court, the Honorable LeBaron B. Colt, Circuit Judge, duly assigned to hold said District Court, sitting, that the time for filing claims by creditors of William S. Butler & Company, Incorporated, be extended to January 15, 1913.

On the same day, the following Receivers' Petition was filed: —

RECEIVERS' PETITION FOR AUTHORITY TO SELL MERCHANDISE.

[Filed December 17, 1912.]

The receivers respectfully represent that they have on December 16, 1912, received an offer for the entire stock of merchandise of the Butler's Apparel Shops at 61 per cent of invoice cost of said merchandise; that the parties submitting the offer deposited with the receivers a certified check for ten thousand dollars ($10,000), to be returned if the offer shall not be accepted, and to be applied in part payment if the offer is accepted. The acceptance of said offer has the approval of the creditors' committee and is recommended by the receivers. Wherefore, the receivers pray that an order of notice may issue to all creditors of William S. Butler & Company, Incorporated, returnable Tuesday, December 24, at 11 o'clock, that they may show cause, if any they have, why the acceptance of said offer should not be authorized by the court.

CHARLES F. WEED,
MILROY H. GIBSON,
EDWARD B. WILSON,
Receivers,
by their Solicitors,
Choate, Hall & Stewart.

On the twenty-sixth day of said December, the following Decree was entered on the foregoing receivers' petition: —

DECREE UPON RECEIVERS' PETITION FOR AUTHORITY TO SELL MERCHANDISE.

DECEMBER 26, 1912.

COLT, J. This cause came on to be heard upon the petition of the receivers filed December 17, 1912, for authority to sell merchandise, and it appearing that due notice was given to all creditors, in accordance with the order entered December 17th, it is ordered that the receivers may sell and deliver to R. H. White Company all the merchandise of William S. Butler & Company, Incorporated, remaining in their possession at the close of business December 24th, in consideration of 61 per cent of the invoice cost of said merchandise, payable cash on delivery.

It is further ordered that the injunction heretofore issued on November 7, 1912, restraining said William S. Butler & Company, Incorporated, from further transacting any business be, and the same is hereby, modified to the extent of permitting said company to execute a confirmatory bill of sale of said merchandise.

By the Court,

CHARLES K. DARLING, *Clerk.*

On the thirteenth day of January, A. D. 1913, it was ordered by the court, the Honorable LeBaron B. Colt, Circuit Judge as aforesaid, sitting, that the motion of the National Union Bank for extension of time within which creditors may prove claims be allowed and time for proving claims against William S. Butler & Company, Incorporated, be extended thirty days from January 15, 1913, to February 14, 1913.

On the eleventh day of February, A. D. 1913, it was ordered by the court, the Honorable Frederic Dodge, Circuit Judge, duly assigned to hold said District Court, sitting, that motion for extension of time for filing proofs of claims against William S. Butler & Company, Incorporated, be allowed and time be extended to April 1, 1913.

This cause was thence continued to the March Term, A. D. 1913, when, to wit, March 24, 1913, it was ordered by the court, the

Honorable Frederic Dodge, Circuit Judge as aforesaid, sitting, that the motion of the National Union Bank for extension of time for proving claims against William S. Butler & Company, Incorporated, be allowed and time be extended to May 1, 1913.

At the same term, to wit, April 7, 1913, the following Petition of the Receivers was filed:—

PETITION OF THE RECEIVERS FOR INSTRUCTIONS RELATIVE TO THE OBLIGATION OF WILLIAM S. BUTLER & COMPANY, INCORPORATED, TO WM. FILENE'S SONS COMPANY.

[FILED APRIL 7, 1913.]

Respectfully represent, Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, receivers of William S. Butler & Company, Incorporated, as follows:—

On November 7, 1912, the date of the appointment of the receivers, William S. Butler & Company, Incorporated, was the tenant of certain premises on Washington and Winter Streets and Jackson Place in Boston under a written lease from Wm. Filene's Sons Company, dated May 29, 1912, in the terms and provisions of which there had been no default.

On December 2, 1912, the receivers paid to Wm. Filene's Sons Company a sum equivalent to the amount due Sunday, December 1st, according to the terms of the lease, to wit, the sum of $13,132.96, and advised the lessor that they had not yet elected whether or not to adopt the lease; that in case they should adopt the lease said payment should operate as payment of rent, and in case they should disaffirm the lease the lessor might apply the payment on account of the receivers' obligation for use and occupation of the premises from November 7th. The lessor received said payment without prejudice to any of its rights with reference to or under the lease.

On December 5, 1912, the receivers notified the lessor of their election not to affirm, assume or in any way be responsible under said lease, and thereafter by agreement with the lessor occupied the premises until December 31, 1912, and then vacated the premises and delivered them up to the lessor.

On December 9, 1912, the lessor by permission of this court entered upon the premises and took possession thereof.

The receivers are advised and therefore allege that as receivers they are indebted to the lessor for the fair value of their use and occupation of the premises from November 7 to December 31, 1912, less the sum of $13,132.96, which they have paid on account. In their petition filed herein March 22, 1912, they have prayed that such fair value be determined.

The receivers are advised and therefore allege that William S. Butler & Company, Incorporated, is indebted to the lessor for rent under the lease for the period from November 1 to November 6, 1912. They know of no other obligation either of the receivers or of William S. Butler & Company, Incorporated, to Wm. Filene's Sons Company except as set forth herein and in their petition filed March 22, 1912.

On December 17, 1912, Wm. Filene's Sons Company presented to William S. Butler & Company, Incorporated, and to the receivers a written demand as follows: —

"Boston, December 17, 1912.

To William S. Butler & Co., Inc., Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers of William S. Butler & Co., Inc., 453 Washington Street, Boston, Mass.

Gentlemen: — On December 9, 1912, by permission of the United States District Court for the District of Massachusetts, granted on a petition filed in the case of *Isaac McLean Company* v. *William S. Butler & Company, Inc.*, for default in the performance of the terms of a lease dated May 29, 1912, from William Filene's Sons Company to William S. Butler & Company, Inc., we re-entered upon the premises in said lease described, took possession thereof and terminated said lease.

By the provisions of the lease above referred to, in case of termination thereof for breach of condition and failure to perform the covenants and agreements thereof, the lessee agreed to pay to the lessor upon demand a sum equal to $20,000 per year, and at the same rate for any fractional part of a year unexpired for so much of the period from the beginning of said lease to February 27, 1921, as remained unexpired, and with one day added, less a discount at the rate of 5% per annum on the payments of $20,000 per year provided for in said lease.

We hereby demand payment from the said William S. Butler &

Company, Inc., and from said receivers of said corporation named above, of said sum of $20,000 per year and at the same rate for any fractional part of the year for the period to February 27, 1921, remaining unexpired, with one day added, less said discount.

Very truly yours,

WM. FILENE'S SONS COMPANY,

Edward A. Filene, Pres."

By order of this court the time for proof of claims against William S. Butler & Company, Incorporated, was fixed, expiring January 1, 1913, and by subsequent orders the time has been extended until May 1st, by reason of the pendency in this court of an involuntary petition in bankruptcy against said corporation, the record of which is hereby referred to.

The interests of the creditors of said corporation require that the question be speedily determined whether Wm. Filene's Sons Company has any valid claim against said corporation or its receivers other than as hereinabove admitted, and especially whether it has any valid claim under its written demand of December 17, 1912, hereinabove set forth, to the end that, upon the termination of said bankruptcy proceedings and the expiration of the time for proof of claims in this suit, a speedy distribution of the assets of said corporation may be made.

Wherefore the receivers pray that the court after due notice to Wm. Filene's Sons Company and a hearing may determine the amount of indebtedness of William S. Butler & Company, Incorporated, to Wm. Filene's Sons Company, and whether the receivers are under any further obligation to Wm. Filene's Sons Company than the obligation set forth in their petition filed March 22, 1913.

Also at the same term, the following Answer of Wm. Filene's Sons Company to the foregoing petition was filed: —

ANSWER OF WM. FILENE'S SONS COMPANY TO PETITION OF THE RECEIVERS FOR INSTRUCTIONS RELATIVE TO THEIR OBLIGATIONS TO WM. FILENE'S SONS COMPANY.

[FILED APRIL 8, 1913.]

Now comes Wm. Filene's Sons Company, and for answer to said petition filed by said receivers says: —

FIRST. As to so much of said petition as asks instructions relative to the payment for use and occupation of certain premises:

1. The respondent admits the execution of the lease dated May 29, 1912, in said petition referred to, for the period therein specified, and says that by the terms of said lease said William S. Butler & Company, Incorporated, undertook to pay the aggregate rentals reserved in the over leases of said premises, in said lease to said William S. Butler & Company, Incorporated, referred to, and all other payments by the lessees in said leases to be made, and to pay to the lessor a further sum of twenty thousand (20,000) dollars per year, in equal monthly instalments. This respondent craves leave to refer to said lease for a more particular statement of the terms thereof.

2. This respondent says that the premises demised to said William S. Butler & Company, Incorporated, included four buildings and part of another building, all held on separate leases; that each of said leases ran for the term, with one day added, specified in said lease to said William S. Butler & Company, Incorporated, for that part of the premises demised to it, and that said over leases respectively reserved as rental and payments in the nature of rent the following amounts, except that from and after December 31, 1912, the rental for the building called the Stowell building was to be fifty-nine hundred (5900) dollars per year instead of fifty-two hundred (5200) dollars per year: —

Building.	Rent.	Tax.	Insurance.	
Corner,	$36,000	none	none	$36,000.00
Coppenhagen,	22,500	$6,150.00	$171.30	28,821.30
Ditson,	22,000	6,642.00	253.68	28,895.68
Dexter,	45,000	16,695.20	none	61,695.20
Stowell,	5,200	none	none	5,200.00
	$130,700	$29,487.20	$424.98	$160,612.18

3. This respondent says that by the terms of said lease to William S. Butler & Company, Incorporated, the lessee, in addition to the annual rental and payments in the nature of rent reserved by the over leases, amounting in the aggregate to one hundred and

sixty thousand six hundred and twelve and eighteen one-hundredths (160,612.18) dollars, as above set forth, was to pay said annual sum of twenty thousand (20,000) dollars, and was to pay insurance upon all fittings, furnishings and fixtures in the demised premises, which insurance on the basis of the first year of said lease amounted to an annual sum of nineteen hundred and forty-three and five one-hundredths (1,943.05) dollars, making the total rental and payments in the nature of rent reserved in said lease at the rate of one hundred and eighty-two thousand five hundred and fifty-five and twenty-three one-hundredths (182,555.23) dollars per annum prior to December 31, 1912, and at the rate of one hundred and eighty-three thousand two hundred and fifty-five and twenty-three one-hundredths (183,255.23) dollars after December 31, 1912.

4. This respondent says that by the terms of said lease to said William S. Butler & Company, Incorporated, the lessee was to pay for all water used on the premises during the term of said lease and for steam heat furnished in said Stowell building, and was to keep the premises in repair. During the period from November 7, 1912, to December 31, 1912, water was supplied upon said premises, for which the lessee should have paid three hundred and fifteen and ninety-two one-hundredths (315.92) dollars. During said period steam heat was furnished in said Stowell building, for which the lessee should have paid seventy-one and twenty one-hundredths (71.20) dollars. During said period repairs were required to the lighting plant upon said premises, which should been paid by the lessee, amounting to two hundred (200) dollars.

5. This respondent says that the rent and payments in the nature of rent reserved and to be paid by the lessee in said lease to said William S. Butler & Company, Incorporated, annually do not exceed the fair rental value per annum of the demised premises, and that for the period of twelve (12) months from September 3, 1912, said amount would have been, so far as can be estimated, one hundred and eighty-two thousand five hundred and fifty-five and twenty-three one-hundredths (182,555.23) dollars, together with a proportionate part of seven hundred (700) dollars for the period from and after December 31, 1912, representing the increase in

rental of said Stowell building, making an aggregate of one hundred and eighty-three thousand and twenty-five and seventy-nine one-hundredths (183,025.79) dollars. The premises were intended for and were occupied by said receivers for the business of a department store. The period from November 7 to and including December 31 represents the most valuable part of the year for the use of said premises, and this respondent estimates the value of the premises for occupation during said period as not less than twenty (20) per cent of the value for occupation during a whole year. Wherefore this respondent says that said receivers should be required to pay to it, for use and occupation of said premises during said period from November 7, 1912, to December 31, 1912, inclusive, not less than twenty (20) per cent of the annual rental value of said premises amounting to not less than one hundred and eighty-three thousand and twenty-five and seventy-nine one-hundredths (183,025.79) dollars, and should also be required to pay to it the amounts due as above set forth for use of water, steam heat and repairs.

SECOND. As to so much of said petition as asks instructions in relation to the ownership of certain chattels, this respondent says:

1. By the terms of said lease to said William S. Butler & Company, Incorporated, all fixtures, furnishings and fittings upon said premises at the time said lease was made remained the property of the lessor, and in case of default by the lessee all fixtures, furnishings and fittings installed by it were to become the property of the lessor. All the articles of furniture and equipment referred to in said petition as purchased by William S. Butler & Company, Incorporated, prior to November 7, 1912, were fixtures, furnishings or fittings, and according to the terms of said lease became, upon default by the lessee, the property of the respondent.

WM. FILENE'S SONS COMPANY,
by its Solicitors,
BRANDEIS, DUNBAR & NUTTER.

On the twenty-ninth day of said April, it was ordered by the court, the Honorable Frederic Dodge, Circuit Judge as aforesaid,

sitting, that the motion of the National Union Bank to extend time for proving claims against William S. Butler & Company, Incorporated, be allowed and time for proving claims against William S. Butler & Company, Incorporated, be extended to June 1, 1913.

On the twenty-sixth day of May, A. D. 1913, the following Order extending time for proving claims was entered:—

ORDER ON PETITION OF RECEIVERS FOR ORDER EXTENDING TIME FOR PROOF OF CLAIMS.

MAY 26, 1913.

DODGE, J. Ordered, petition for extension of time for proving claims against William S. Butler & Company, Incorporated, allowed, and time extended to July 1, 1913.

By the Court,

CHARLES K. DARLING, *Clerk*,
by JOHN E. GILMAN, Jr., *Deputy Clerk*.

This cause was thence continued to the June Term, A. D. 1913, when, to wit, July 1, 1913, the following Order on Petition of Receivers for Order Extending Time for Proof of Claims was entered:—

ORDER ON PETITION OF RECEIVERS FOR ORDER EXTENDING TIME FOR PROOF OF CLAIMS.

JULY 1, 1913.

DODGE, J. Ordered, petition for extension of time for proving claims against William S. Butler & Company, Incorporated, allowed, and time extended to August 1, 1913.

By the Court,

CHARLES K. DARLING, *Clerk*,
by JOHN E. GILMAN, Jr., *Deputy Clerk*.

On the twenty-fourth day of said July, it was ordered by the court, the Honorable Frederic Dodge, Circuit Judge as aforesaid, sitting, that the motion of the National Union Bank for extension of time for proving claims against William S. Butler & Company,

Incorporated, be allowed and time for proving claims by creditors against William S. Butler & Company, Incorporated, be extended to September 1, 1913.

On the twenty-seventh day of August, A. D. 1913, it was ordered by the court, the Honorable Frederic Dodge, Circuit Judge as aforesaid, sitting, that the time for proving claims against William S. Butler & Company, Incorporated, be further extended to October 1, 1913.

This cause was thence continued to the September Term, A. D. 1913, when, to wit, September 30, 1913, the following Claim of Wm. Filene's Sons Company was filed with the receivers:—

CLAIM OF WM. FILENE'S SONS COMPANY.

STATEMENT AND VERIFICATION OF CLAIMS OF WM. FILENE'S SONS COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF MASSACHUSETTS IN 1912.

[FILED SEPTEMBER 30, 1913.]

On or about May 29, 1912, William S. Butler & Company, Incorporated, hereinafter referred to as the lessee, and Wm. Filene's Sons Company, a corporation organized under the laws of Massachusetts in 1903, hereinafter referred to as the lessor, executed a lease of certain premises situated in the City of Boston, and in said lease described. A copy of said lease, marked "I", is hereto annexed and made a part hereof.

By the terms of said lease the lessee undertook to perform all the obligations imposed on the lessor by the over leases referred to in said lease, and to pay to the lessor a rental equal to the rentals from time to time payable under said over leases, and a further sum of twenty thousand (20,000) dollars, yearly, during the term of said lease and at that rate for any fraction of a year, payment to be made to the lessor in monthly instalments on the first day of each calendar month. A schedule showing, at the annual rate, the rental and other payments reserved in and payable under the said over leases is hereto annexed and made a part hereof.

By instrument of even date with said lease the Gilchrist Company guaranteed the punctual payment of the lessee of all sums to

be paid by the lessee thereunder and full performance by the lessee of all the covenants and agreements in said lease contained by the lessee therein to be performed. A copy of said guarantee is attached to the copy of the lease hereto annexed and is made a part hereof.

On or about September 3, 1912, the lessor assigned to the claimant, Wm. Filene's Sons Company, a corporation organized under the laws of Massachusetts in 1912, all its right, title and interest in and under said lease.

On or about September 3, 1912, the lessee entered said premises under said lease and its term thereunder began.

The claimant presents for allowance claims relating to said lease and to the occupation of said premises by the lessee as follows:—

First. By the terms of said lease the lessee agreed to pay for all water used on said premises during its term therein and to save the lessor harmless from all liability therefor, and on September 4, 1912, the lessee used on said premises water supplied by the City of Boston to the claimant's account with said city, to the value of seven dollars and forty-two cents ($7.42), and on or about September 30, 1912, said amount became due and payable to the city of Boston, but the lessee then and at all times neglected to pay for the water used as aforesaid and failed to save the claimant harmless from liability therefor, and the claimant was on or about October 10, 1912, obliged to pay to the City of Boston for the water used as aforesaid seven dollars and forty-two cents ($7.42), which sum the claimant says that it is entitled to recover from the lessee.

Second. During the ninety (90) days immediately succeeding September 4, 1912, water supplied by the City of Boston to the claimant's account with said city to the value of five hundred and thirty-two dollars and eighty cents ($532.80) was used on said premises. On or about December 31, 1912, said amount became due and payable to the city of Boston, and on November 7, 1912, the date of the appointment of the lessee's receivers, there was due to the City of Boston as the claimant estimates for water used by the lessee on said premises during the period of sixty-four (64) days from September 5, 1912, to November 7, 1912, both inclusive,

sixty-four ninetieths of five hundred and thirty-two dollars and eighty cents ($532.80), to wit, three hundred and seventy-eight dollars and eighty-eight cents ($378.88), but the lessee has at all times neglected to make any payment for the water used as aforesaid during said sixty-four (64) days, and the claimant was on or about January 10, 1913, obliged to pay to the City of Boston for the water used as aforesaid during the said ninety (90) days five hundred and thirty-two dollars and eighty cents ($532.80). Wherefore the claimant asks that the amount due and payable to it on account of the water used by the lessee as aforesaid during said period of sixty-four (64) days be found to be three hundred and seventy-eight dollars and eighty-eight cents ($378.88), which amount the claimant says that it is entitled to recover from the lessee.

THIRD. On December 1, 1912, there was due and payable under said lease as rental for the month of November, 1912, thirteen thousand one hundred and thirty-two dollars and ninety-eight cents ($13,132.98), and on December 9, 1912, on which date the claimant, as hereinafter set out, entered said premises and terminated said lease, there was due under said lease as rental for the first nine (9) days of December, 1912, nine-thirty-firsts of thirteen thousand one hundred and thirty-two dollars and ninety-eight cents ($13,132.98), to wit, three thousand eight hundred and twelve dollars and eighty cents ($3812.80), and there was therefore due to the claimant as rental under said lease on said ninth day of December, 1912, the total amount of sixteen thousand nine hundred and forty-five dollars and seventy-eight cents ($16,945.78), no part of which has ever been paid to the claimant. From November 7, 1912, the date of the appointment of the receivers of the lessee, to a date subsequent to said ninth day of December, 1912, said receivers had the exclusive use and occupation of said premises. The claimant therefore asks that the amount due and payable to it from said receivers for their use and occupation of said premises for the period from November 7, 1912, to December 9, 1912, both inclusive, be ascertained, and the claimant says that it is entitled to recover from the lessee the difference between the aforesaid total

amount of sixteen thousand nine hundred and forty-five dollars and seventy-eight cents ($16,945.78) and such amount as shall be ascertained to be due from said receivers for the said period from November 7, 1912, to December 9, 1912.

FOURTH. Said lessee agreed by the terms of said lease that it would maintain in good order and repair, reasonable use and wear and damage by fire or other unavoidable casualty excepted, all of the premises, fixtures, furnishings and fittings demised by said lease. During its occupancy of said premises prior to said seventh day of November, 1912, said lessee neglected to maintain the buildings included in said premises and the heating plant and certain of the pipes, exhausts and chimneys contained in said buildings in good order and repair, but with unreasonable and negligent use thereof caused and permitted said buildings, plant, pipes, exhausts and chimneys to fall into disrepair, to the damage of the claimant, as it estimates, to the amount of fourteen hundred and seventy-nine dollars ($1479.00), and the claimant asks that its damages be assessed in that amount and says that it is entitled to recover that amount from the lessee.

FIFTH. On or about September 4, 1912, the claimant entered into an agreement with the lessee whereby the claimant agreed to assign to the lessee certain insurance policies relating to the aforesaid premises, and the lessee agreed immediately upon the assignment of said policies to pay the claimant therefor the sum of two thousand and sixty-seven dollars and nine cents ($2067.09), said sum being the total amount of the several portions of the premiums which the claimant or its assignor had theretofore paid on said policies, proportionate to the respective periods during which said policies would continue in force, subsequent to the beginning of the lessee's term under said lease. And on or about September 4, 1912, the claimant assigned said policies to the lessee and thereupon there became due and payable to the claimant said sum of two thousand and sixty-seven dollars and nine cents ($2067.09), but the lessee at all times neglected to pay to the claimant said sum or any part thereof. On or about December 31, 1912, said policies were reassigned to the claimant, and the claimant accepted said

reassignment as part payment on account of said sum of two thousand and sixty-seven dollars and nine cents ($2067.09), to the extent of thirteen hundred and eighty dollars and eighty-one cents ($1380.81), said amount being the total of the several portions of the premiums on said policies, proportionate to the respective periods during which said policies would continue in force, subsequent to said thirty-first day of December, 1912, and there remains, therefore, due and payable to the claimant on account of the sum of two thousand and sixty-seven dollars and nine cents ($2067.09), which the lessee agreed to pay as aforesaid, six hundred and eighty-six dollars and twenty-eight cents ($686.28), which amount the claimant says that it is entitled to recover from the lessee.

SIXTH. On or about November 7, 1912, on petition of Isaac McLean Sons Company, a corporation duly organized by law, by decree of the District Court of the United States for the District of Massachusetts, Charles F. Weed, of Brookline, in said district, and Milroy H. Gibson, of Boston, in said district, were appointed receivers of the lessee and gave bonds in the amount required by said court and said court approved said bonds, and ever since their appointment as aforesaid said Weed and said Gibson have acted and are now acting as receivers of the lessee. On or about December 3, 1912, Edward B. Wilson of West Newton, in said district, was by decree of said court appointed co-receiver of the lessee, and gave bond as required by said court, and said court approved said bond, and in conjunction with said Weed and said Gibson and said Wilson has ever since acted and is now acting as one of the receivers of the lessee. On or about February 5, 1913, on the petition of Emuel T. Pamenberg, of the State of New York, and others, creditors of the lessee, by decree of the District Court of the United States for the District of Massachusetts, the lessee was adjudged bankrupt, and thereafter the lessee and Brown-Durrell Company, a corporation organized by law and a creditor of the lessee, appealed from the decree whereby the lessee was adjudged bankrupt. On or about December 1, 1912, there became due and payable from the lessee as aforesaid, under the terms of said lease, as rental for the month of November, 1912, thirteen thousand one

hundred and thirty-two and ninety-eight-hundredths (13,132.98) dollars. The lessee failed to pay said amount, and since the appointment on or about November 7, 1912, of its receivers the lessee has wholly failed to perform its obligations under said lease. On or about December 5, 1912, the receivers notified the claimant that they had elected not to affirm or assume said lease. On or about December 9, 1912, the claimant, in accordance with permission of said court theretofore given in the receivership proceedings brought as aforesaid by Isaac McLean Sons Company against the lessee, duly re-entered said premises for breach of condition and failure to perform the covenants and agreements of said lease and terminated said lease. From the termination of said lease to and including December 31, 1912, said receivers had continuously the use and occupation of all of the aforesaid premises. By the terms of said lease the lessee agreed that in case of termination thereof for breach of condition and failure to perform the covenants and agreements thereof the lessee would pay to the lessor upon demand: —

"a sum equal to twenty thousand (20,000) dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one (1) day added (less the five (5) per cent discount, as aforesaid), and will, at the election of the lessor, which election may be made or changed at any time, either:

(*a*) Pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same instalments, or if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in porportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in each case, however, such sum paid under the preceding clause as represents a part of such instalment, or,

(*b*) Pay to the lessor, as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however, such sum as has been paid for the same period under the above clause requiring a payment of twenty thousand (20,000) for each year or fractional part thereof, or —

(c) Indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid during the residue of the term, taking into account any sum paid under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof unexpired."

The claimant asserts its right to elect to receive and demand payment up to and including April 1, 1913, of sums equal to the rent and other payments named in said lease in the same instalments as therein provided, less such sums as it has received by re-letting the premises, a schedule of which is hereto annexed, and less a proportionate part for each instalment of such sum as it recovers in respect to said payment of twenty thousand (20,000) dollars per year, and the right to elect to receive and demand payment of the difference between the rental value of said premises on April 1, 1913, which it asks to have ascertained, and the rent and other payments reserved in said lease for the residue of the term of said lease, less such sum as it may recover for the same period in respect to said payment of twenty thousand (20,000) dollars per year.

Wherefore the claimant says that it is entitled to recover from William S. Butler & Company, Incorporated, —

1. A sum equal to the rental and other payments reserved in said lease from November 1 to November 7, 1912.

2. The amounts above set forth for failure to observe and perform the obligations of said lease.

3. A sum equal to a payment at the rate of twenty thousand (20,000) dollars per year in monthly instalments from December 9, 1912, to February 28, 1921, less a discount at the rate of five (5) per cent per annum on the payments anticipated.

4. A sum equal to the excess, if any, of the rental and other payments reserved in said lease for the period from November 7, 1912, to December 31, 1912, above such sum as may be paid by the receivers for use and occupation of the premises during said period, and less a proportionate part for the period from December

9 to December 31, 1912, of any payment recovered under clause 3 above.

5. Payments of the amounts specified in said lease from January 1, 1913, to April 1, 1913, less such sums as were received from subletting the premises during said period, and less a proportionate part for said period of any sum recovered under clause 3 above.

6. A sum equal to the difference between the rental value of said premises from April 1, 1913, for the balance of the term of said lease and the rental and other payments reserved under said lease payable for the same period, less any sum recovered for said period under clause 3 above.

In the alternative, if it be correctly decided that the claimant cannot make the election above specified, the claimant claims in place of the clauses 4, 5 and 6 above, —

4. A sum equal to the excess, if any, of rental and other payments reserved in said lease for the period from November 7, 1912, to December 9, 1912, above such sum as may be paid by the receivers for occupation during said period.

5. A sum equal to the difference between the rental and other payments reserved in said lease for the period from December 9, 1912, to the end of the term, and the rental value of said premises on December 9, 1912, for the period from that date to the end of the term, less any sum that may be paid under clause 3 above in respect to said period.

And no part of any of the foregoing claims has been paid.

WM. FILENE'S SONS COMPANY,
by EDWARD J. FROST, *Assistant Treasurer.*

The claimant's attorneys are:

BRANDEIS, DUNBAR & NUTTER,
161 Devonshire Street, Boston, Mass.

At Boston, in the District of Massachusetts, on the thirtieth day of September, 1913, came Edward J. Frost, of Boston, in said district, and made oath and says that he is assistant treasurer of the above-named claimant, Wm. Filene's Sons Company, a corporation organized under the laws of Massachusetts in 1912, and that, being

duly authorized so to do, he has, as assistant treasurer as aforesaid, signed the foregoing statement of claims in the name of said corporation, and that said statement of claims is true.

EDWARD J. FROST.

Subscribed and sworn to before me this thirtieth day of September, A. D. 1913.

ALBERT W. RICE,
Justice of the Peace.

I.

This indenture, made this twenty-ninth day of May, A. D. 1912, between Wm. Filene's Sons Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, hereinafter called the lessor, which expression and any pronoun referring thereto shall include its successors and assigns wherever the context permits, and William S. Butler & Company, Incorporated, a corporation duly organized under the laws of said Commonwealth, hereinafter called the lessee, which expression and any pronoun referring thereto shall include its successors and assigns wherever the context permits, witnesseth:

The lessor, in consideration of the covenant of the lessee to pay a sum equal to twenty thousand (20,000) dollars per year for each year from the beginning of the term to February 27, 1921, and the same rate for a fraction of a year, and of the other covenants herein contained by the lessee to be performed, hereby demises and leases unto the lessee the following described premises, situated in the City of Boston, in the Commonwealth of Massachusetts, viz.:

First. The premises, bounded: Northerly by Winter Street; Easterly by Washington Street; Southerly by the next parcel hereinafter described; Westerly by Jackson Place; together with all rights and appurtenances thereto in, over or under Jackson Place; excepting and reserving, however, the premises now occupied by the Transit Commission or the Boston Elevated Railway Company, for or in connection with the Washington Street tunnel and its exits and entrances. Said demised premises are the same leased to the

lessor by the City of Boston by lease dated August 22, 1907, a copy of which is hereto annexed marked "A", to which reference is hereby made, and are subject to all exceptions and reservations in said lease contained.

Second: The premises, bounded: Northerly by the parcel last above described; Easterly by Washington Street; Southerly by the parcel next hereinafter described; and Westerly by Jackson Place; together with all rights appurtenant thereto in, over or under Jackson Place. The demised premises are the same leased to the lessor by the trustees of the Coppenhagen Real Estate Trust by lease dated March 31, 1911, a copy of which and of a supplemental indenture relating thereto dated November 25, 1911, are hereto annexed marked "B" and "BB" respectively, to which reference is hereby made.

Third: The premises known as the Ditson Building, bounded: Northerly by the parcel last above described; easterly by Washington Street; Southerly by the parcel next hereinafter described; and Westerly by Jackson Place; together with all rights appurtenant thereto in, over or under Jackson Place. The demised premises are the same leased to the lessor by Charles H. Ditson by lease dated November 3, 1904, a copy of which is hereto annexed marked "C", to which reference is hereby made.

Fourth: The premises known as the Dexter Building, bounded: Northerly by the parcel last above described; Easterly by Washington Street; Southerly by premises now or late of Charles P. Greenough et al., trustees; Westerly by Jackson Place; together with all rights appurtenant thereto in, over or under Jackson Place. The demised premises are the same leased to the lessor by Gordon Dexter et al., trustees, by lease dated January 1, 1905, a copy of which is hereto annexed marked "D", to which reference is hereby made.

Fifth: All those premises on the Westerly side of Jackson Place described in a lease from A. Stowell & Co., Inc., to the lessor, dated April 10, 1908, a copy of which is hereto annexed marked "E", to which reference is hereby made.

Also all the fixtures, furnishings and fittings belonging to the

lessor now upon the demised premises so far as not destroyed prior to the beginning of the term, including counters, show cases, bundle desks, etc., but subject to the right of ownership of the telephone system and of any other things not owned by the lessor, and excepting such of said fixtures, furnishings and fittings as the lessor may want for use in its new store and removes for that purpose prior to the beginning of the term. All of said demised premises and fixtures, furnishings and fittings are to be taken in the condition in which they are at the beginning of the term, and are to be maintained by the lessee in good order and repair, reasonable use and wear and damage by fire or other unavoidable casualty excepted, and the electric lighting plant is to be maintained in good condition and fit for use, damage by fire or other unavoidable casualty excepted. The lessee, during the continuance of the term hereof, shall cause said fixtures, furnishings and fittings, including the electric light plant, to be insured against damage by fire or explosion in policies for the benefit of and payable in case of loss to the lessor for the full insurable value thereof or such other sum as may be mutually agreed upon, and if the same are damaged or destroyed by fire it is mutually agreed that the proceeds from such insurance shall be applied to replacing the same or in the event that the demised premises are thereby rendered unfit for occupancy and are not restored by the lessor or over-lessors, so that replacement as aforesaid is impracticable, then the proceeds as aforesaid shall be applied first to the payment of sums due or to become due to the lessor hereunder and the balance, if any, paid over to the lessee. Prior to the beginning of the term the lessor shall keep said fixtures, furnishings and fittings insured as aforesaid, and if the same are damaged or destroyed by fire before the beginning of the term the proceeds from such insurance shall be applied to replacing the same or in the event that replacement is impracticable as aforesaid then they shall be applied to the payment of the sums due and to become due from the lessee to the lessor hereunder. The lessee may remove fixtures, furnishings and fittings during the term, except the electric lighting plant, upon substituting others of equal value;

such substituted fixtures, furnishings and fittings shall be subject to all the foregoing provisions; in case of default by the lessee all fixtures, furnishings and fittings installed by it shall become the property of the lessor; otherwise at the expiration of the term all the demised fixtures, furnishings and fittings, including the electric lighting plant, shall become the property of the lessee and may be removed by it.

To Have and to Hold the said premises hereby leased unto the lessee for the following terms all beginning on such date after September 1, 1912, as the lessor may, by not less than one (1) week's prior notice in writing, fix, and ending, unless sooner terminated as hereinafter provided:

(1) as to the first, second and third parcels described, on February 27, 1921;

(2) as to the fourth parcel described, on December 30, 1920;

(3) as to the fifth parcel described, on December 30, 1918.

Yielding and Paying (except in case of fire or other unavoidable casualty as hereinafter mentioned) as rental a sum equal to the aggregate rentals payable from time to time under the several leases to the lessor above mentioned for the premises at such times respectively remaining covered by this lease, including all payments required to be made by the lessee in said several leases, payable at the times in said several leases specified, together with a further sum of twenty thousand (20,000) dollars yearly, payable in equal monthly instalments until February 27, 1921, the first payment to be made on the first day of the first calendar month beginning after the beginning of the term as provided above and to be for a proportionate part of a month according to the time when under such provision the term begins, and upon the expiration of this lease by limitation a proportionate part for the month of February, 1921, unexpired on the twenty-seventh thereof of all sums payable under said over-leases and of said sum of twenty thousand (20,000) dollars per year.

The lessee covenants with the lessor for and during said term and for such further time as the lessee or any person claiming under it shall hold the said premises or any part thereof during the

continuance of any over-lease as to the part or parts so held, to pay to the lessor the rent above reserved punctually when due, (except in case of fire or other unavoidable casualty as hereinafter mentioned), and including the payments at the times in said several leases to the lessor provided, and all other sums by said leases respectively required to be paid by the lessee therein, including all taxes, whether in the nature of taxes now in being or not, assessments and other charges as therein provided; to pay for all water, gas, electric power, electric light, or other agency furnished upon the premises, so as to save the lessor and the owners of said several parcels, so far as the lessor may be responsible to any such owner, harmless from all liability therefor.

The lessor agrees that upon the written request of the lessee and of the over-lessors in all of said several leases at the time of such request in force, to the lessors so to do, and upon payment of a sum equal to twenty thousand (20,000) dollars per year for each year of the term hereof unexpired, (less a discount at the rate of five (5) per cent. per annum on payments so anticipated), with one (1) day added, and at the same rate for a fractional part of a year, to cancel and terminate all of such over-leases and that thereupon the rents and other payments herein reserved with respect to the several leases so cancelled shall be abated.

The lessee further covenants with the lessor that it will not make or suffer any strip or waste, or over-loading, injury or defacement of said demised premises in any way, or any unlawful, improper or offensive use thereof, or any use or occupation thereof contrary to any present or future law of the Commonwealth, or to any law or ordinance of the City of Boston, or that shall be injurious to any person or property, or such as to affect any insurance on said premises, or increase the premium required therefor, beyond that of an ordinary risk as defined by the Boston Board of Fire Underwriters for premises to be used for a wholesale and retail dry goods business or a department store or other business not more injurious to the premises; that it will not put ashes in wooden receptacles upon the premises; that it will keep all the glass in the premises whole and in good order and replace any which may be

broken or injured, except by fire or other unavoidable casualty, with glass of the same quality; that neither the lessor nor any of the lessors in said several over-leases shall be liable to the lessee or to any person or persons for any injury or damage arising from neglect in not removing snow or ice from the roofs of the buildings or from the sidewalks, roads or streets bordering on or in the leased premises, or from any cause or causes which may arise from the condition of the buildings or premises, whether resulting in injury to persons or property, and that the lessee will save harmless and indemnify the lessor and said over-lessors from any and all such liability and from any and all loss or damage occasioned by use or misuse of the Cochituate or other water or by the bursting of the water pipes, or by any nuisance made or suffered on the premises, and will defray the expense of cleaning and keeping clean the drains, cesspools, vaults and water-closets on said premises, and that all property of any kind that may be on said premises shall be at the sole risk of said lessee, and that neither the lessor nor said over-lessors shall be liable to said lessee or any person for any injury, loss or damage to any person or property on said premises, but that as to all responsibility connected with the management of the same said lessee will stand in the place of the owner thereof; that it will not assign this lease or underlet the whole or any part of the premises, or permit any person, whether jointly with said lessee or otherwise, to occupy the whole or any part thereof, without the consent of said lessor in writing first given allowing thereof; that at the termination of this lease as to each parcel of the demised premises peaceably it will yield up to the lessor or those having its estate therein all and singular the premises and all future erections and additions upon or to the same, except, in case there is no default, the fixtures, fittings and furnishings as aforesaid, in good, tenantable repair in all respects, reasonable wearing and use thereof, damage by fire or other unavoidable casualty excepted; that it will make all repairs which by said several leases the lessee therein is required to make as to the respective parts of the premises, and will not call upon the present lessor to make any repairs whatsoever.

The lessee may make any alterations in the premises authorized by the over-lease of the part of the premises where such alteration is to be made, upon complying with the terms of such over-lease in respect thereto.

Provided nevertheless, that in case the premises are damaged or destroyed by fire or other unavoidable casualty, or by action of the public authorities, or a portion of the premises is taken for public use, the rent and other payments to be made by the lessee hereunder, except said payment of twenty thousand (20,000) dollars per year, shall be abated in proportion to the injury, until the premises, or what is left of them in case of a taking, are restored by the lessor or by the over-lessor of each part so destroyed or injured, or until the over-lease of such part is cancelled in accordance with the provisions of such over-lease.

In case for any cause the over-lease of any part of the demised premises is terminated, this lease shall nevertheless continue as to the balance of the demised premises, and said payment of twenty thousand (20,000) dollars per year shall continue without any abatement in whole or in part by reason of partial or complete damage, destruction or taking by eminent domain or termination wholly or in part of the over-leases.

The lessor covenants so long as there is no default by the lessee to do all that is required of it to be done by the terms of said over-leases to keep the same in force.

It is understood and agreed that upon the termination or expiration of the over-lease as to any part of the demised premises this lease shall terminate as to such part. This lease is made subject to all the conditions and provisions contained in the several leases to the lessor above mentioned to the extent to which each is in force and applicable, and the lessee further covenants that it will in all respects observe and perform all the covenants, terms and provisions in the several leases above mentioned to the lessor contained, and especially will at or before the expiration of said several leases respectively perform all the obligations therein imposed upon the lessee therein to restore, repair or alter the premises therein demised or will obtain a full release to the lessor herein

from all obligation and liability to do so, and will indemnify and hold harmless the lessor herein from and against any and all liability, claim, demand or damage under, by reason of or in any way arising from the covenants and provisions of said several leases from and after the beginning of the term hereunder.

All payments required by the several over-leases to the several lessors, which by this lease are to be made by the lessee herein, shall if and as long as the lessor in writing requests be made direct to the several over-lessors and when so made shall constitute a satisfaction *pro tanto* of the requirements of this lease, and the lessee shall be entitled to make any adjustment of taxes or other payments with any of the over-lessors in accordance with the provisions of such over-lease, so far as relates to payments so made or to be made by it.

Provided also, and these presents are upon the condition, that if the lessee shall neglect or fail to perform and observe any of the covenants, agreements, terms, or conditions contained in this instrument, whether hereinbefore or hereinafter written, which on its part are to be performed or kept, or if its leasehold interest shall be taken on execution, or if the lessee shall be declared bankrupt or insolvent, according to law, or if any assignment of its property shall be made for the benefit of its creditors, or a receiver appointed of its property and not discharged within ninety (90) days, then, and in any of the said cases, the said lessor lawfully may, immediately, or at any time thereafter, and notwithstanding any license of any former breach of any of the said covenants, terms or conditions herein, or any waiver of the benefit thereof in a former instance, without further notice or demand, enter into and upon said premises, or any part thereof, in the name of the whole, and repossess the same as of its former estate; and upon entry as aforesaid, this lease shall be determined, and said lessee and all claiming under it shall be considered to all intents and purposes as holding possession of said premises without right, so as to entitle the said lessor and those having its estate therein to any existing or future remedies under the laws of this Commonwealth for recovering summary possession thereof, or it may expel the

said lessee and all claiming under it, and remove their effects, forcibly, if necessary, without being taken or deemed guilty of any manner of trespass, and, in either case, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant: and said lessee covenants and agrees, as aforesaid, that in case of such termination or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will pay to the lessor upon demand a sum equal to twenty thousand (20,000) dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one (1) day added, (less the five (5) per cent discount, as aforesaid), and will, at the election of the lessor, which election may be made or changed at any time, either:

(*a*) Pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same instalments, or if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in such case, however, such sum paid under the preceding clause as represents a part of such instalment, or,

(*b*) Pay to the lessor, as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however, such sum as has been paid for the same period under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof, or

(*c*) Indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid during the residue of the term, taking into account any sum paid under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof unexpired.

The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency or receivership proceedings or against any assignee or trustee for the benefit of creditors.

The lessor agrees that it will not refuse permission to the lessee to sub-let or to allow any other corporation or person to occupy the whole or parts of the demised premises, except for reasonably sufficient objections to such corporation or person or to the purpose of such occupation.

The lessor further covenants with the lessee at any time prior to December 1, 1912, on not less than thirty (30) days' written notice and upon payment of five hundred and fifty thousand (550,000) dollars, to transfer to said lessee or its nominee all the shares in the Coppenhagen Real Estate Trust and also to grant to the lessee or its nominee the right in case the first parcel herein demised is offered to the lessor for purchase in accordance with the provisions of the lease thereof from the City of Boston to accept such offer and to permit the lessee or its nominee to purchase the same according to such offer, provided the lessee upon notice in writing to it of such offer indemnifies the lessor by good and sufficient indemnity against all liability from such acceptance; if the lessee fails to make such payment or to furnish such indemnity, the lessor may purchase said property in its own behalf. In case the property owned by or the shares in the Coppenhagen Real Estate Trust is or are at the time of any payment or tender under the above provision subject to any mortgage, pledge or other incumbrance created by the lessor, transfer shall be made subject to such incumbrance, but the amount of such incumbrance shall be deducted from the price payable upon the lessee securing the release of the lessor from further personal liability in respect thereto, or if such release is not obtained such amount shall be applied by the lessor to the satisfaction or as security for the future satisfaction of such incumbrance, and if said premises or shares are subject to any attachment or levy of execution, a sum sufficient to cover the same shall be deducted and applied by the lessor to the dissolution of such attachment or levy or to satisfactorily indemnifying the lessee against

the same. No purchase hereunder shall affect the right of the lessor to continue to receive the full rental herein reserved.

Except as above provided the lessee shall not be entitled to the benefit of any right or purchase in said lease from the City of Boston, nor shall the lessee be entitled to the benefit of any agreement for the erection of a new building in connection with any of said leases.

In Witness Whereof said Wm. Filene's Sons Company and said Wm. S. Butler & Co., Incorporated, have respectively caused these presents to be signed in their respective names and their respective corporate seals to be hereto affixed, the day and year first above written.

WM. S. BUTLER & CO. INCORPORATED.
by William E. Butler Treas. [CORPORATE SEAL]
WM. FILENE'S SONS CO.
by Edward A. Filene Pres. [CORPORATE SEAL]

Commonwealth of Massachusetts.

Suffolk, ss. May 29th 1912.

Then personally appeared Edward A. Filene, President of the Wm. Filene's Sons Company, who signed the foregoing instrument, and acknowledged said instrument to be the free act and deed of said Wm. Filene's Sons Company. Before me —

Alfred L. Fish, Justice of the Peace.

Commonwealth of Massachusetts.

Suffolk, ss. May 29th, 1912.

Then personally appeared William E. Butler, Treasurer of Wm. S. Butler & Co., Incorporated, who signed the foregoing instrument, and acknowledged said instrument to be the free act and deed of said Wm. S. Butler & Co., Incorporated. Before me —

Alfred L. Fish, Justice of the Peace.

William E. Butler and Gilchrist Company, in consideration of the delivery of the within lease and of one (1) dollar and other valuable considerations to each paid, hereby jointly and severally guarantee to the lessor, its successors and assigns, punctual pay-

ment by the lessee of all sums to be paid by the lessee in the within lease and full performance by the lessee of all the covenants and agreements in the within lease contained by the lessee to be performed, each of us hereby waiving notice of default and demand.

WILLIAM E. BUTLER [SEAL]
GILCHRIST COMPANY
by William E. Butler Treas [CORPORATE SEAL]

The Gilchrist Company in consideration of the delivery of the above lease and one (1) dollar and other valuable considerations to it paid, covenants and agrees with Wm. Filene's Sons Company that in case default is made by the lessee in the foregoing lease in performance of any of the provisions thereof, and such default is not made good by the guarantors or one of them, to take upon request in writing from said Wm. Filene's Sons Company, made at any time after such default and while the same continues, a lease for the unexpired term of the foregoing lease of all parts of said demised premises then remaining subject to the lease, upon the same terms as in said lease set forth, and William E. Butler for the consideration aforesaid agrees with said Wm. Filene's Sons Company in case such lease is given to the Gilchrist Company, to guarantee said lease in the same manner as the above lease.

[CORPORATE SEAL] GILCHRIST COMPANY [SEAL]
by William E. Butler Treas.
WILLIAM E. BUTLER.

SCHEDULE SHOWING, AT ANNUAL RATE, RENTAL AND OTHER PAYMENTS RESERVED IN AND PAYABLE UNDER OVER LEASES.

Building.	Rent.	Tax.	Insurance.
Corner	$36,000.	none	none
Coppenhagen	22,500.	$6,150.	$171.30
Ditson	22,000.	6,642.	253.68
Dexter	45,000.	16,695.20	none
Stowell	5,200. after Dec. 31, 1912, $5,900.	none	none

AMOUNTS RECEIVED BY RE-LETTING PREMISES.

Amount received from Burrows Company, for 3 weeks,	$900.
" " " " " for heat, for 3 weeks,	9.
" " for rent of space for fruit stand, for 3 months,	75.
	$984.

ABSTRACT OF OVER LEASES REFERRED TO IN THE LEASE FROM WM. FILENE'S SONS COMPANY TO WILLIAM S. BUTLER & COMPANY, INCORPORATED.

A.

This Indenture, made this twenty-second day of August, A. D. 1907, between the City of Boston, acting through the Boston Transit Commission, hereinafter called the lessor (which expression shall include the successors and assigns of said City and Commission unless the context is clearly inconsistent therewith), and Wm. Filene's Sons Company, a corporation duly organized under the laws of Massachusetts, hereinafter called the lessee (which expression shall include its successors and assigns unless the context is clearly inconsistent therewith), Witnesseth:

In consideration of the covenants herein contained by the lessee to be performed the lessor hereby demises and leases unto the lessee all the parcel of land with the building thereon situated in the City of Boston, bounded northerly by Winter Street; easterly by Washington Street; southerly by land now estate of James J. Storrow et al., and westerly by Jackson Place, together with all rights and appurtenances thereto in, over or under said Jackson Place, excepting and reserving, however, so much of said premises as is or will be occupied by the Washington Street tunnel and the entrances thereto and exits therefrom, substantially as shown in the final plans thereof now on file in the office of said Commission, and the right to construct, maintain and use said tunnel, entrances and exits according to said plans.

To Have and to Hold the demised premises unto the said lessee

from the first day of September, A. D. 1907, to and through the 28th day of February, A. D. 1911, unless sooner terminated as hereinafter provided, and upon notice in writing from the lessee to the lessor, given not less than six months before the expiration of said term, of election to take said premises for a further term, to have and to hold the same for the further term of ten years expiring on February 28th, A. D. 1921, unless sooner terminated as hereinafter provided.

Yielding and paying (except only in case of fire or other casualty as hereinafter mentioned) rent at the rate of Twenty-eight Thousand Dollars ($28,000) per year in equal monthly instalments of Two Thousand Three Hundred and Thirty-three and 33/100 Dollars ($2333.33), payable on the first day of each month for the month ending the preceding day, and at the same rate for any part of a month unexpired at the legal termination of the lease, and at the same rate for any further time beyond the expiration of the lease that the lessee or persons claiming under it may hold the said premises or any part thereof; but the rent shall be abated until December 1st next, and the first payment shall be made on January 1st, 1908, for the month ending December 31st, 1907. . . .

It is agreed that in case said lessee elects to take for the further term of ten years the lessor may at any time after January 31st, 1913, give notice in writing of its election to have said building appraised, and thereupon the lessee shall appoint an appraiser, the lessor shall appoint an appraiser, and these two a third; said three appraisers shall proceed to determine the fair cash value of said leased premises and report in writing to the parties the amount fixed by them or a majority of them. If five per cent upon such value exceeds the annual rental above fixed, such rental shall for the balance of the term from the date of the appraisers' report beginning not earlier than February 28th, 1913, be increased to such amount as equals five per cent of such value, otherwise the rent payable for the balance of the term shall remain unchanged. The lessor shall pay the cost of such appraisal.

The lessee further covenants with the lessor to pay during said term as the same become due and payable all taxes, charges for

water and assessments, except assessments for betterments, and will keep the premises insured at its expense for the benefit of the lessor in companies satisfactory to the lessor to an amount not less than eighty per cent of the value of the building; . . .

It is agreed that for any period for which by reason of the ownership of the premises by the City of Boston taxes are not payable, the lessee shall pay to the lessor, instead of the rental above specified, in monthly instalments a rental at the rate of thirty-six thousand (36,000) dollars per year, less the proportion of insurance premiums for that period, subject to the same provisions as to abatement hereinbefore contained.

And the said lessor covenants and agrees with the said lessee that it paying the rent aforesaid, and performing the covenants and fulfilling the conditions and agreements herein contained, on its part to be paid, performed and fulfilled, shall peaceably hold and enjoy the said leased premises without hindrance or interruption by the said lessor, or any other persons claiming under it.

In Witness Whereof, the Boston Transit Commission has executed this instrument, pursuant to a vote of the Commission the members adopting a common seal and not being bound in their personal capacity; and said Wm. Filenes Sons Company has caused these presents to be signed in its name and behalf and its corporate seal to be hereto affixed, by A. Lincoln Filene, its President thereto duly authorized. Executed in duplicate.

THE CITY OF BOSTON
GEORGE G. CROCKER [SEAL]
The Boston Transit Commission

WM. FILENES SONS CO.,
by A. Lincoln Filene, Prest. [CORPORATE SEAL]

B.

This Indenture, made this thirty-first day of March in the year 1911, between Thomas K. Cory, Edward J. Frost and John R. Simpson, as Trustees under the Declaration of Trust of the Coppenhagen Real Estate Trust, so-called, dated March 20, 1911, and to

be recorded with Suffolk Deeds, hereinafter called the Lessors, which expression shall include the heirs, successors in trust and assigns of said Trustees wherever the context permits, and Wm. Filene's Sons Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, hereinafter called the Lessee, which expression shall include its successors and assigns wherever the context so permits, Witnesseth:

That in consideration of the covenants herein contained on the part of the said Lessee to be kept and performed, the said Lessors do hereby grant, demise and lease unto the said Lessee a building on Washington Street in said City of Boston numbered 447 to 449, together with all rights in Jackson Place appurtenant to said premises, the demised premises being more particularly described in a deed from said corporation to said Lessors, dated March 20, 1911.

To Have and to Hold the said premises hereby demised unto the said Lessees from the day of the date hereof during the full term of ten (10) years thence next ensuing. The Lessors have purchased said premises, assuming all charges from March 1, 1911, and the rental reserved under this lease shall be payable as from March 1, 1911.

Yielding and Paying, except only in case of fire or other casualty or act of the public authorities as hereinafter mentioned, the rent or sum of Twenty-two thousand five hundred (22,500) dollars yearly from March 1, 1911, by equal monthly payments of Eighteen-hundred seventy-five (1875) dollars each on the 28th day of each and every month hereafter during said term, and at the same rate for such further time as the Lessee or any person claiming under it shall hold the said premises or any part thereof, and at the same rate for any part of a month unexpired at the legal termination of this lease, the first payment to be made on or before the first day of April next ensuing for the full month of March now current.

And the Lessee hereby covenants with the said Lessors that it will during the said term and for such further time as the Lessee or any person claiming under it shall hold the said premises or any part thereof, pay unto the Lessors the said monthly rent upon the

days hereinbefore appointed for the payment thereof, except only in case of fire or other casualty or act of the public authorities as hereinafter mentioned, and also punctually when due all the taxes, water rates and assessments of whatsoever kind, except assessments for betterments, . . .

The Lessee further covenants that it will keep all and singular the demised premises in such repair, order and condition inside and outside as the same are in at the commencement of said term, or may be put in during the continuance thereof, reasonable wear and use, damage by fire or other unavoidable casualty only excepted; and will pay to the Lessors on demand all insurance premiums on the building, glass, elevators, general liability, contingent liability and rents to the full rental value, and against explosion. Such insurance against fire shall be to an amount equal to One hundred per cent (100%) of the insurable value of the property so insured, exclusive of foundations as appraised from time to time by the Boston Board of Fire Underwriters, or some such similar board succeeding to its powers, if and so far as insurance to that amount is obtainable. Insurance of rents shall be for the amount of the rental and taxes for a period of nine (9) months. Insurance against contingent and general liability shall be for not less than a Ten thousand (10,000) dollar–Twenty thousand (20,000) dollar policy, so called, and, at the option of the Lessee, may be taken insuring both Lessors and Lessee in one policy. All insurance shall be placed by the Lessee, but shall be payable to the Lessors, and approved by them, and shall remain in their possession. . . .

In Witness Whereof, the Lessors have hereto set their hands and seals, and the Lessee has caused its corporate seal to be hereto affixed and these presents to be signed in its name and behalf by Edward A. Filene its President on the day and year first above written.

Executed in duplicate.

THOMAS K. COREY
EDWARD J. FROST
JOHN R. SIMPSON
WM. FILENE'S SONS CO.
By Edward A. Filene President.

BB

Whereas by Indenture dated March 31st, 1911, Thomas K. Cory and others, as Trustees under the declaration of Trust of the Copenhagen Real Estate Trust, demised the premises numbered 447 and 449 Washington Street, in the City of Boston, Massachusetts, to Wm. Filene's Sons Company, for ten (10) years from the date of said indenture; and

Whereas it was the intention of the parties that said lease should run to and including February 28, 1921, only;

Now Therefore, we, Thomas K. Cory, Edward J. Frost and A. Lincoln Filene, who are the present Trustees under said Declaration of Trust and as such the owners of the reversion expectant on said lease, and the said Wm. Filene's Sons Company, the lessee in said lease named, do hereby agree that said lease be and hereby is altered and amended so that the term thereof shall extend to and including February 28, 1921, only, and shall have effect in all respects as if the term thereof had originally been expressed to be from the date thereof to and including February 28, 1921, and covenant with each other to do all things and execute all instruments necessary or proper to give said lease the same effect as if it had originally been so expressed and written. In all other respects said lease shall remain and be in full force and effect, including the provision that rent is to be paid thereunder as from March 1, 1911.

In Witness Whereof, we, the said Thomas K. Cory, Edward J. Frost and A. Lincoln Filene, as Trustees as aforesaid, hereunto set our hands and seals, and the said Wm. Filene's Sons Company has caused its corporate seal to be hereto affixed and these presents to be signed in its name and behalf by Edward A. Filene, its President, on this 25th day of November, A. D. 1911.

Executed in duplicate.

THOMAS K. CORY [SEAL]
EDWARD J. FROST [SEAL]
A. LINCOLN FILENE [SEAL]
WM. FILENE'S SONS CO.
Edward A. Filene.

[CORPORATE SEAL]

C.

This Indenture, made the third day of November in the year nineteen hundred and four between Charles H. Ditson, of the City and State of New York, party of the first part, hereinafter called the Lessor, and Wm. Filene's Sons Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its principal place of business in Boston in said Commonwealth party of the second part, hereinafter called the Lessee, . . .

Witnesseth, That in consideration of the covenants herein contained on the part of the said Wm. Filene's Sons Company and its successors and representatives, to be kept and performed the said Charles H. Ditson doth hereby grant, demise and Lease unto the said Wm. Filene's Sons Company a building on Washington Street and Jackson Place in said Boston numbered 451 on said Washington Street, . . .

To Have and to Hold the said premises hereby demised unto the said Wm. Filene's Sons Company and its successors and representatives, from the first day of November, 1904, during the full term of sixteen (16) years and four (4) months thence next ensuing. . . .

Yielding and Paying (except only in case of fire or other casualty or act of the public authorities as hereinafter is mentioned) the rent or sum of twenty-two thousand (22,000) dollars yearly, by equal monthly payments of $1833.34 each at the expiration of each and every month hereafter during said term, and at that rate for such further time as the said Lessee, or any other person or persons claiming under it shall hold the said premises or any part thereof; the first payment thereof to be made on the first day of December now next ensuing. . . .

And the said Lessee for itself and its successors and representatives hereby covenants with the said Lessor, his representatives and assigns, that it will, during the said term, and for such further time as the said Lessee or any other person or persons claiming under it shall hold the said premises or any part thereof, pay unto the Lessor his heirs or assigns, the said yearly rent, upon the day

hereinbefore appointed for the payment thereof (except only in case of fire or other casualty or act of the public authorities as hereinafter mentioned), and also all the taxes, insurance on the premises and rent, and water taxes, and assessments whatsoever, except assessments for betterments, whether in the nature of taxes now in being or not, which may be assessed upon or payable for, or in respect of, the said premises, or any part thereof, during the said term; . . .

In Witness Whereof, the said parties have hereunto, interchangeably, set their hands and seals.

CHARLES H. DITSON
WM. FILENE'S SONS CO.
Edward A. Filene, Treasurer.

Signed, sealed and delivered in presence of
(Sturgis Coffin)

This Indenture, made the first day of January in the year 1905, between Gordon Dexter, of Beverly, in the County of Essex and Commonwealth of Massachusetts, and John Lowell, of Newton, in the County of Middlesex in said Commonwealth, as trustees under the will of F. Gordon Dexter, late of said Beverly, and as trustees under the will of Edward Dexter, late of Bourne, in the County of Barnstable in said Commonwealth, hereinafter called the Lessors, of the first part, and Wm. Filene's Sons Company, a corporation duly organized under the laws of Massachusetts, hereinafter called the Lessee, of the second part.

Witnesseth, That in consideration of the covenants herein contained, on the part of the said party of the second part and its representatives, to be kept and performed, they, the said parties of the first part, do hereby demise and lease unto the said party of the second part, a certain parcel of land with the stone and brick building thereon situated on the westerly side of Washington Street in the City of Boston, County of Suffolk and said Commonwealth, and being at present numbered 453 to 463 inclusive, for the purpose of carrying on a wholesale and retail business in the Dry Goods trade or a Department Store or other business not more

injurious to the premises. If the parties do not agree as to whether any business would be more injurious, the controversy shall be decided by the arbitrators as hereinafter provided. Together with all rights in Jackson Place, including the right, so far as the Lessors can grant the same, to build over or tunnel under said passageway.

To Have and to Hold the said building and other premises hereby leased unto the said party of the second part and its representatives, from the first day of January, nineteen hundred and six, during the full term of fifteen (15) years thence next ensuing, unless sooner terminated as hereinafter provided.

Yielding and paying (except only in case of fire or other casualty, as hereinafter mentioned) the rent or sum of thirty-seven thousand five hundred (37,500) dollars, yearly, for the first five (5) years, by equal monthly payments, to wit,— thirty-one hundred and twenty-five (3,125) dollars on the first day of each and every month in every year during said period, the first payment to be made on the first day of February, 1906, and from January 1, 1911, at the rate of forty-five thousand (45,000) dollars, yearly by equal monthly payments, to wit,— thirty-seven hundred and fifty (3,750) dollars on the first day of each and every month during said period, the first payment to be made on the first day of February, 1911, and the last monthly payment thereof to be made on the last day of December, 1920, and at that rate for such further time and fractions of a month, as the said Lessee, or any person or persons or any corporation claiming under it shall hold the said premises or any part thereof.

And the said Lessee, for itself and its successors and assigns, hereby covenants with and promises to said Lessors, their heirs, representatives, and assigns, for and during the said term and such further time as it or any person claiming under it shall hold said premises or any part thereof, as follows: —

That it will pay unto the Lessors or their representatives or assigns, the said yearly rent upon the days hereinbefore appointed for the payment thereof (except only in the case of fire and other unavoidable casualty as hereinafter mentioned); also all the taxes

and assessments whatsoever, whether in the nature of taxes now in being or not, which may be payable for or in respect of said premises or any part thereof; also all the gas, electric power, electric light and water rates when and where the same are properly payable, so as to save the said Lessors and their representatives harmless from all liability therefor. . . .

In Witness Whereof, the parties hereinto and to one other duplicate original hereof, set their hands and seals, the day and year first above written.

Wm. Filene's Sons Co.,
Witness to signature Edward A. Filene, Treasurer.
Taber Sears. John Lowell,
William H. Dunbar to all. Gordon Dexter, Trustees.

E.

Stowell Leases, Consolidated.

This Indenture, made this tenth day of April, in the year one thousand nine hundred and eight between A. Stowell & Co., Inc., a corporation duly organized according to law and having its usual place of business at Boston, Suffolk County, Massachusetts, hereinafter called the lessor, party of the first part, and Wm. Filene's Sons Company, a corporation duly organized and existing according to law and having its usual place of business at Boston aforesaid, hereinafter called the lessee, party of the second part.

Witnesseth: That the said party of the first part doth hereby demise and lease unto the said party of the second part

All the building numbered (4) on Jackson Place (sometimes called number 3) in said Boston, except the first floor and basement thereof; said first floor being occupied by the Winter Place Hotel, and the premises thereby leased being the same premises described in lease of December 18, 1902, from C. P. Sampson to Edward A. Filene and A. Lincoln Filene, copartners under the name of William Filene Sons, and now occupied by the lessee. It is understood and agreed that the lessor shall have the right to remove at pleasure the stairway leading from Jackson Place to the

second floor of the premises herein leased, and place it on the Westerly side of the building, still opening on Jackson Place; such change shall be made so as not to interfere with the use of the premises by the lessee and the premises shall be put in good order and condition, all without expense to the lessee.

Also all the buildings numbered 2 and 3 (sometimes called number 2) on said Jackson Place in said Boston, except the first floor and basement in each, the premises hereby leased being the premises now occupied by the lessee, and being a part of the buildings leased by the Wilder Heirs to the lessor herein and lying between number 4 above referred to and the premises leased by the Wilder Heirs to the lessor herein.

Also the premises on the second floor of the estate numbered 22 Winter Street in said Boston, now occupied by the lessee and shown on Plan hereto annexed and marked "A" and "B" on said Plan. Said premises marked "A" on said plan being described as follows: Having a frontage of about fifty-six (56) feet on Winter Street and a depth varying from twenty-nine (29) feet to fifty-two (52) feet approximately as shown on said plan. Said premises marked "B" on said plan being described as follows: A floor space sixty-nine (69) feet six (6) inches by nineteen (19) feet, except a space twenty (20) feet by five (5) feet in one corner as shown on said plan.

Also the premises on the third floor of said estate numbered 22 Winter Street and directly over said second floor premises marked "B" above described, and being shown on said plan hereto annexed marked "C" on said plan.

Also the spaces or areaways on said third floor shown on said plan, and marked "D", with the right to build over and occupy the same, and connect the same with the rest of the premises. . . .

To Have and to Hold the same for the term ending January 1st, 1918, beginning with the first day of April, 1908,

Yielding and Paying therefor rent at the rate of fifty-two hundred dollars per annum up to January 1st, 1913, and fifty-nine hundred dollars per annum from January 1st, 1913, to January 1st, 1918, to be paid in equal monthly payments, the first of such

payments to be made on the first day of May next, and at the same rate for any part of a month unexpired at the legal termination of this lease.

And the lessee for itself and its assigns hereby covenants with the lessor and its successors and assigns that it and its successors and assigns will pay the said rent in manner aforesaid; and also all water rates to which said premises or any part thereof may become liable during the said term; . . .

In Witness Whereof the said parties hereunto, and to another instrument of like tenor, set their hands and seals on the day and year first above written.

Wm. Filene's Sons Co.
Edward A. Filene, President.
A. Stowell & Co. Inc.
Chas. S. Cook, President.

Executed and delivered in presence of
T. K. Cory

The foregoing leases "A" to "E" also contain covenants and provisions relative to the payments of rents as above stated, taxes, water rates, charges for gas and electricity, insurance, glass, drains, water pipes, strip and waste, repairs, maintenance, indemnity for accidents, use of premises, heating, sales by the lessors, assignments and extensions of the leases, sub-letting, takings in whole or in part by public authority, destruction in whole or in part by fire or other casualty, quiet enjoyment of the premises, termination and re-entry by the lessors in case of such taking or destruction or of default or bankruptcy or receivership of the lessees, and payments by the lessees in the event of such termination.

EXHIBIT 31.

Boston, Mass., April 12th 1912

E. A. Filene, Esq. Boston, Mass.

My Dear Mr. Filene — After carefully considering your last proposition, I have come to the following conclusion.

I can see the situation clearly, at least to my own satisfaction,

and have decided that I can handle it. I have worked out the plans, the policy, and the organization, sufficiently to feel perfectly assured in my own mind that I can operate the plant successfully. I have a plan for amply financing the enterprise and I have no doubt whatever of my ability to carry it out, but I am not willing however to place myself in a position where failure to come to an agreement about the lease would be annoying.

After due consideration I feel that my signature is suffieient and should be accepted by you on an agreement to lease, provided we can agree upon terms. I therefore make the following proposition.

For your assignment of the leases described in the Eldridge Circular, I will pay you twenty thousand dollars ($20,000) a year bonus on the terms stated in the Eldridge Circular. In other words, I will accept the proposition in the Eldridge circular with one modification, that the bonus instead of being three hundred and forty thousand dollars ($340,000) for the term, shall be twenty thousand (20,000.) a year.

I will agree furthermore that the lease shall begin 30 days after you notify me that you have vacated the premises, we to have the privilege of making improvements meanwhile.

Should you care to give me an agreement for a lease upon these terms, I shall be pleased to hear from you.

As other plans of mine must be held in abeyance while the offer is pending, I shall have to limit it to a reasonable length of time—say two weeks.

Yours,

W. E. B.

EXHIBIT 32.

FORM OF LETTER SENT IN RESPONSE TO REQUEST FOR FACTS.

November 3, 1911.

Dear Sir: We beg to acknowledge your favor of November 2d. The following are the facts in regard to the present *Filene Store*.

It consists of four buildings, situated on the corner of Washington and Winter Streets, and three small buildings on Jackson Place, in the rear, connected by a bridge to the main buildings, having a frontage of 138 feet 9 inches on Washington Street by 93

feet 9 inches on Winter Street, covering a total area of 12,705 square feet. The buildings are of various heights, but have been merged into one store, having a total area (including the space on Jackson Place) of some 85,414 square feet, with about 68,000 square feet of selling space.

This corner is practically the most valuable one in this part of the country for the retail business, situated as it is at the junction of the present Washington Street Subway and the New Subway (already contracted for) connecting the Park Street Station of the Boston Elevated Railway with the South Station; thereby affording direct connection with practically all the freight and steam railway lines; serving a population of nearly three million and a half within a 50-mile radius of the City.

Directly opposite are located the establishments of the Jordan, Marsh Company and A. Shuman Company, while opposite, on Winter Street, will shortly be erected the new 10-story building of Gilchrist & Co. In the immediate vicinity are located the premises of the Shepard, Norwell Company; C. F. Hovey & Company; the James A. Houston Company; R. H. Stearns & Company, and the R. H. White Company.

The William Filene's Sons Company have been, and are now, doing a business of more than $4,000,000 per annum, and are only giving up the premises to occupy their new quarters, diagonally across the street; as they had outgrown the present buildings. Their leases of the different properties comprising their stores expire January 1st and February 28th, 1921, with the exception of that portion of the premises on Jackson Place, which lease expires in 1918; but extensions of same can probably be obtained.

For the sum of $340,000, the William Filene's Sons Company will assign their leases of the above-described premises, together with all the rights and options contained therein, including tunnel entrance rights, and the right to have a new building erected on about one-half of the property, at a moderate increase in rental; the right to buy at par all of the Copenhagen Trust stock (amounting to about $450,000), which owns the building next to the corner — practically controlling the two adjoining buildings; and all

the rights and title to the building improvements and equipment which they have installed to the premises, including electric lighting plant and all accessories, and a large amount of fixtures, consisting of:

Counters,
Show cases,
Bundle desks,
Display fixtures (with some exceptions),
Carpets,
Curtains,
Stock rooms,
Balcony waiting room,
Awnings,
Partitions and shelving,
Telephone system,
Private telephone system,

and such other fixtures and furnishings as may be agreed upon in the negotiations.

The present rentals of the premises, including insurance, and taxes assessed as of 1911 (which the tenants pay) amount to about $160,000 per year.

Possession will be given upon the completion of the *Filene New Store*, which we believe will be about September 1st, 1912, when the buildings about which you inquire can be delivered, practically in running order.

Trusting that the above facts will interest you, we are

Very truly yours,

E. EDWARD H. ELDREDGE & CO.

EXHIBIT 33.

Agreement between Wm. Filene's Sons Company, hereinafter called Filene's, and William E. Butler, of Boston, Massachusetts.

1. Filene's agrees to sub-let to said Butler the properties now held by it under the following leases, viz.:

Lease from City of Boston of building corner Washington Street and Winter Street.

Lease from Coppenhagen Real Estate Trust of building No. 447 Washington Street.

Lease from Charles H. Ditson of Ditson Building so-called.

Lease from Gordon Dexter et al. of Dexter Building so-called.

Lease from A. Stowell & Co. Inc., dated April 10, 1908, of premises on Jackson Place.

Such sub-lease shall be for the balance of the respective terms less one (1) day; at the option of Filene's assignments of said leases may be given in place of a sub-lease. The sub-lease or assignment shall take effect one (1) week after notice in writing from Filene's fixing the date therefor.

2. The sub-lease, or assignment of leases if substituted, shall provide for the performance by said Butler of all the obligations imposed by said several leases, including all obligations therein contained as to restoration and repairs at the end of the several terms, and payment direct to the lessors thereof of the rent and other payments by said leases required to be made to the lessors, and shall provide for the payment to Filene's in addition to all rentals and other payments called for by said leases, of twenty thousand (20,000) dollars per year up to February 28, 1921, in monthly instalments of one thousand six hundred and sixty-six and 67/100 (1,666.67) dollars per month, beginning whenever possession of the premises is delivered up, and at the same rate for any fraction of a month. The sub-lease, if given, shall be subject to all provisions of said leases above enumerated, shall not confer upon the sub-lessee, except as hereinafter provided, any right to purchase said building leased by the City of Boston, shall not entitle the sub-lessee to do any act which might impose a liability on Filene's, and shall be in other respects substantially in the form of said lease from Gordon Dexter et al., except as to provisions special to the building there demised, so far as the provisions of said lease are applicable, and with such special provisions as are required by this agreement.

3. The sub-lease or assignment shall include a right to the use of the following fixtures, furnishings and fittings now on the

premises, so far as not destroyed prior to and in such condition as they may be in at the time possession is given to wit:

Counters,
Show cases,
Bundle desks,
Display fixtures, excepting such as are wanted for use in the new store,
Carpets,
Curtains,
Stock rooms,
Balcony waiting room,
Awnings,
Partitions and shelving,
Telephone system, so far as owned by Filene's,
Private telephone system,

and such other fixtures, furnishings and fittings as are not wanted by Filene's for use in its new store, subject to the right of ownership of the telephone system and any similar leased fixtures; and shall require said Butler to maintain all said fixtures, furnishings and fittings in good order and repair, reasonable wear and tear and damage by fire or other unavoidable casualty excepted, and to maintain the electric lighting plant in good condition and fit for use. In case of termination of the sub-lease or assignment for default of the sub-lessee or assignee, all fixtures, furnishings and fittings installed by said Butler shall become the property of Filene's; otherwise all such fittings, furnishings and fixtures and all fittings, furnishings and fixtures belonging to Filene's upon the premises at the end of the term shall then, if there is no default under the sub-lease or the leases assigned, be the property of said Butler and removable by him.

4. Said sub-lease or assignment shall include a right on the part of said Butler at any time within six (6) months from April 17, 1912, to purchase for five hundred and fifty thousand (550,000) dollars all the stock in the Coppenhagen Real Estate Trust and to become entitled to the benefit of all rights of purchase arising under said lease from the City of Boston, provided he is able to

exercise said right without any liability accruing to Filene's in respect thereto. From such price shall be deducted the amount of any incumbrance hereafter placed upon the property of said Coppenhagen Real Estate Trust, provided said Butler assumes such incumbrance and undertakes to indemnify Filene's therefrom; if said stock has been pledged as collateral, said Butler shall only be entitled to the right of redemption from such pledge and the payment shall be reduced by the amount of the indebtedness secured, provided he assumes payment thereof and undertakes to indemnify Filene's therefrom. Such purchase shall not affect the right of Filene's to receive said payment of twenty thousand (20,000) dollars per year till the expiration of the period specified; unless said purchase is made Filene's shall be entitled to the sole benefit of all rights of purchase in said lease from the City of Boston.

5. Said Butler agrees forthwith to accept a sub-lease or assignment on the terms of this agreement, and on or before May 1, 1912, to cause such sub-lease or assignment or the full performance of this agreement to be fully guaranteed in manner satisfactory to Filene's by a corporation to be organized by him, which shall then have a net fully paid in cash capital of not less than two hundred and fifty thousand (250,000) dollars; in the event of his failure to satisfy this requirement Filene's may forthwith by notice in writing terminate this agreement and cancel any sub-lease or assignment made hereunder without prejudice to other remedies or to recovery of damages for breach of this agreement.

6. This instrument shall be binding upon and in favor of the successors and assigns of said Filene's and upon the executors, administrators and assigns of said Butler.

In Witness Whereof the parties hereto have hereunto set their hands and seals this seventeenth day of April, A. D. 1912.

WM. FILENE'S SONS CO. [SEAL]
Edward A. Filene, Pres.
WILLIAM E. BUTLER [SEAL]

This cause was thence continued to the December Term, A. D. 1913, when, to wit, December 15, 1913, the following Order was entered: —

ORDER EXTENDING TIME FOR PROOF OF CLAIMS.

DECEMBER 15, 1913.

DODGE, J. This cause came on to be heard on December 13, 1913, upon the receivers' suggestion for a final decree relative to allowance and disallowance of claims, and it appearing that all claims have been considered by the receivers if filed on or before December 12th it is hereby ordered that the time for filing proofs of claim is hereby extended *nunc pro tunc* from October 1 until December 12, 1913, and that all creditors whose claims have not been presented prior to said date shall be forever barred from participation in the distribution of the assets.

By the Court,

CHARLES K. DARLING.

On the same day, the following Order of Reference to a Special Master was entered: —

ORDER OF REFERENCE TO A SPECIAL MASTER OF CLAIM OF WM. FILENE'S SONS COMPANY *v.* WILLIAM S. BUTLER & COMPANY, INCORPORATED.

DECEMBER 15, 1913.

DODGE, J. This cause came on to be heard upon the suggestion of counsel for the receivers and counsel for William Filene's Sons Company that the petition of the receivers for instructions relative to the obligation of William S. Butler & Company, Incorporated, to Wm. Filene's Sons Company, filed April 7, 1913, and the answer of William Filene's Sons Company thereto, be referred to a special master, and thereupon it appearing that exceptional conditions require a reference to a master for speedy determination of the issues, it is ordered that said controversy be referred to Franklin T. Hammond, Esq., as special master to hear the parties and their evidence and report to the court thereon.

By the Court,

CHARLES K. DARLING, *Clerk.*

Also on the same day, the following Decree Upon Receivers' Petition Relative to Payment of First Dividend was entered : —

DECREE UPON RECEIVERS' PETITION RELATIVE TO PAYMENT OF FIRST DIVIDEND.

DECEMBER 31, 1913.

DODGE, J. This cause came on to be heard upon the petition of the receivers for authority to pay a first dividend to creditors of William S. Butler & Company, Incorporated, whose claims have been allowed, and it appearing that due notice has been given to all creditors of said corporation, it is ordered, adjudged and decreed that the receivers pay a first dividend to said claimants of fifteen per cent of their claims as duly proved and allowed.

By the Court,

CHARLES K. DARLING, *Clerk*.

At the same term, to wit, February 21, 1914, the following Master's Report was filed : —

MASTER'S REPORT.

[FILED FEBRUARY 21, 1914.]

In pursuance of the order of the court in this case I have heard the parties and their evidence, and now report to the court as follows : —

1. On May 29, 1912, the Wm. Filene's Sons Company of 1903, hereinafter called the Filene Company, was the lessee of five adjoining buildings on Washington and Winter Streets in the city of Boston under leases, copies of which are annexed to the claim of the Wm. Filene's Sons Company filed herein. The leases of the properties had been acquired at different times by said company and the buildings had been altered, fitted up and connected by it so as to form one complete department store building, and had been so used by it for a number of years. The premises were in the center of the retail shopping district of Boston.

2. On May 29, 1912, the said company made a written under lease of the premises to William S. Butler & Company, Incorpor-

ated, hereinafter called the Butler Company, under a lease, a copy of which is annexed to the claim filed by the Wm. Filene's Sons Company for a term beginning "on such date after September 1, 1912, as the lessor may by not less than one week's prior notice in writing fix" and ending —

(1) As to the first, second and third parcels described, on February 27, 1921.

(2) As to the fourth parcel described, on December 30, 1920.

(3) As to the fifth parcel described, on December 30, 1917.

The Butler Company took possession of the leased premises under this lease on September 3, 1912.

3. The over leases of the five parcels aforesaid all containing provisions requiring either the consent of the lessors to an underletting or notice of the underletting, such notice was given by the Filene Company to all the over lessors about August 14, 1912. The Filene Company paid to the over lessors after they were notified of the under leases, on September 1, 1912, the rent for August, on October 1 the rent for September and on November 1 the rent for October. The over leases have all continued in effect.

4. On August 31, 1912, the Filene Company assigned to the claimant, the new Filene Company, all its rights under the lease with the Butler Company and its rights in the over leases. The only over lessors who refused to assent to this assignment to the claimant were the owners of the "Dexter" property; but since they accepted the rent after notice of the assignment to the claimant they have waived any claim that the over lease upon their property was broken by the assignment.

5. Receivers of the Butler Company were appointed by the District Court of the United States for the District of Massachusetts on November 7, 1912, and they took possession on that day.

On December 5, 1912, the receivers of the Butler Company elected not to affirm or assume the lease. The correspondence upon this matter consists of two letters as follows: —

"Boston, Dec. 2, 1912.

Wm. Filene's Sons Co., Washington Street, Boston, Mass.

Gentlemen: — The Receivers of Wm. S. Butler & Co., Inc., enclose herewith the Receivers' checks on The National Bank of

Commerce, Nos. 22–29 inclusive, for the sums aggregating $13,-132.96. This sum is equivalent to the amount due December 1st, according to the terms of the lease from you to Wm. S. Butler & Co., Inc., except that the payment of insurance premiums under the lease must remain in abeyance for a short time, pending the report of our insurance broker.

We have not yet elected either to affirm or disaffirm the lease, as we are awaiting the instructions of the court in that regard.

In case we affirm the lease, this payment, together with such payment for insurance as we may make, will preserve the lease. In case we disaffirm it, you may apply this payment on account of our obligation for use and occupation of the premises from November 7th, the date of our appointment. We will advise you of our election immediately upon making it.

Very truly yours,

Encs. C. F. WEED Receiver."

"Boston, December 5th, 1912.

Wm. Filene's Sons Co., Boston, Mass.

Gentlemen: — The Receivers of Wm. S. Butler & Co., Inc., hereby notify you of their election not to affirm, assume, or in any way be responsible under, the lease from you to Wm. S. Butler & Co., Inc., dated May 29th, 1912.

It is their intention to vacate the premises as soon as conveniently possible. For use and occupation of the premises from November 7th, the date of their appointment, until such time as they shall vacate the premises, they will pay such reasonable amount, including therein the sums already paid you by checks, accompanying their letter of December 2nd, as may be agreed upon, or, if no agreement may be made, such amount as the court, which appointed them, may direct. Very truly yours,

C. F. WEED
for self and co-receivers."

6. Upon the petition of the claimant filed December 9, 1912, the court ordered that the claimant "be permitted to exercise any power of re-entry contained in the lease of said premises and thereby to terminate said lease for any default now existing in the performance of the terms and conditions of said lease and for that purpose to repossess themselves of said premises".

On December 9, 1912, the claimant took possession of the premises under this decree.

7. On December 17, 1912, the claimant made a demand upon

the Butler Company and its receivers for the payment of a sum equal to $20,000 per year for the unexpired term of the lease less a discount of 5 per cent per annum. This demand was contained in the following letter: —

"December 17, 1912.

To William S. Butler & Co., Inc., Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers of William S. Butler & Co., Inc., 453 Washington Street, Boston, Mass.

Gentlemen: — On December 9, 1912, by permission of the United States District Court for the District of Massachusetts, granted on a petition filed in the case of *Isaac McLean Company* v. *William S. Butler & Company, Inc.*, for default in the performance of the terms of a lease dated May 29, 1912, from William Filene's Sons Company to William S. Butler & Company, Inc., we re-entered upon the premises in said lease described, took possession thereof and terminated said lease.

By the provisions of the lease above referred to, in case of termination thereof for breach of condition and failure to perform the covenants and agreements thereof, the lessee agreed to pay to the lessor upon demand a sum equal to $20,000. per year, and at the same rate for any fractional part of a year unexpired for so much of the period from the beginning of said lease to February 27, 1921, as remained unexpired, and with one day added, less a discount at the rate of 5% per annum on the payments of $20,000. per year provided for in said lease.

We hereby demand payment from the said William S. Butler & Company, Inc., and from said receivers of said corporation named above, of said amount of $20,000. per year and at the same rate for any fractional part of the year for the period to February 27, 1921, remaining unexpired, with one day added, less said discount.

Yours very truly,

WM. FILENE'S SONS COMPANY.

Edward A. Filene, Pres."

8. The proportionate part of the monthly rent payable by the Butler Company for the period from November 1, 1912, to November 7, 1912, is $2972.04, and this sum it is conceded by the receivers the claimant is entitled to prove. The following amounts are also conceded by the receivers to be properly provable by the claimant: —

Water (item 1 of claim)	$7.42
Water (item 2 of claim)	378.44
Insurance	381.58

The total of these items, $3739.48, is the total amount which, according to the contention of the receivers, the claimant is entitled to prove.

9. The controversy in the case relates to the claimant's contention that it is entitled to prove damages under certain provisions of the lease to the Butler Company hereinafter set out.

The lease provided that the Butler Company should pay —

"as rental a sum equal to the aggregate rentals payable from time to time under the several leases to the lessor above mentioned — payable at the times in said several leases specified together with a further sum of twenty thousand (20,000) dollars yearly payable in equal monthly instalments until February 27, 1921, the first payment to be made on the first day of the first calendar month — after the beginning of the term."

The clause in the lease dealing with the right to terminate the lease and the consequences thereof provided that if the lessee should fail to perform, the lessor might enter and determine the lease. Then followed this clause: —

"Said lessee covenants and agrees, as aforesaid, that in case of such termination or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will pay to the lessor upon demand a sum equal to twenty thousand (20,000) dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one (1) day added, (less the five (5) per cent. discount, as aforesaid,) and will, at the election of the lessor, which election may be made or changed at any time, either:

(*a*) Pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same instalments, or if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in each case, however, such sum paid under the preceding clause as represents a part of such instalment, or,

(*b*) Pay to the lessor, as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however,

such sum as has been paid for the same period under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof, or

(c) Indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid during the residue of the term, taking into account any sum paid under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof unexpired.

The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency or receivership proceedings or against any assignee or trustee for the benefit of creditors."

Under these provisions of the lease the claimant contends that it may prove:

a. The present worth on December 9, 1912 (when entry to terminate was made), of $20,000 per year until February 27, 1921, discounted at 5 per cent.

b. The difference between the rentals and other sums payable under the lease made to the Butler Company for the period from January 1, 1913, to April 1, 1913 (excluding the proportional part of the $20,000 per year which the company was bound to pay), and the amount realized by the claimant by subletting the premises during that period.

c. The difference between the rentals and other sums payable under the lease made to the Butler Company for the rest of the term after April 1, 1913 (excluding any of the $20,000 per year item aforesaid), and the rental value of the premises.

10. I find that there was no breach of the lease until December 2, 1912, when the Butler Company was required to pay about $13,000 rent. On that day the receivers paid to the claimant a sum equal to the amount of the rent, but stated that the payment should be considered for use and occupation if they elected not to adopt the lease. This election they made on December 5, 1912, as above set forth.

11. If the claimant is entitled to prove the present worth of $20,000 per year (paragraph 9, clause "*a*", above), the further question arises whether the discount should be monthly or annu-

ally, at simple or compound interest. Upon this subject I find as follows: —

(*a*) The present worth on December 9, 1912, of $20,000 per year up to February 27, 1921, discounted *annually* at 5 per cent, simple discount, is $134,971.17; at compound discount, the other terms remaining the same, the amount is $132,125.

(*b*) The present worth on December 9, 1912, of $20,000 per year up to February 27, 1921, discounted *monthly* at 5 per cent, simple discount, is $137,587.36; at compound discount, the other terms remaining the same, the amount is $135,127.19.

12. As to the claim stated in paragraph 9, clause "*b*", I make these additional findings:

The rent and other sums payable under the lease made to the Butler Company for the period from January 1, 1913, to April 1, 1913, excluding the proportional part of the $20,000 per year, is $40,813.80. During this period a portion of the premises were sublet by the claimant. The amount so realized was $984.

If the claimant is entitled to prove damages on the basis stated in paragragh 9, clause "*b*", I find that the amount for which it would be thus entitled to prove is the sum of $39,829.80.

13. As to the claim stated in paragraph 9, clause "*c*", I find as follows: —

The rentals and other sums payable under the lease made to the Butler Company from April 1, 1913, to the end of the term are as follows:

The rentals and other payments were to run for seven years and eleven months upon three of the five properties leased, that is, the "City of Boston", the "Coppenhagen" and the "Ditson" building. The total of these rentals and payments for the term amounts, at $93,716.98 per annum, to $741,926.10.

On the "Dexter" property, so called, the payments were to run for seven years and nine months at $61,695.20 per annum, amounting to $478,137.80.

On the "Stowell" property, so called, they were to run for four years and nine months at $5900 per annum, amounting to $28,025. These payments include in the cases of the Coppenhagen, Ditson

and Dexter properties items of taxes which would of course not remain constant throughout the term. The amount included for taxes in the figures of $93,716.98 and $61,695.20 above given is the amount paid for the year 1912.

As to the rental value of the premises I find the following: —

After the failure of the Butler Company the claimant made energetic efforts to find tenants for the properties leased to it. As a result of these efforts an agreement was made on March 13, 1913, under which the "Dexter" and the "Ditson" properties were leased to one Perry from March 14, 1913, to the end of the term, Perry agreeing to assume the obligations imposed in the over-leases. Perry, however, was given a credit of $20,000 on account of these obligations, which was equivalent to the rent from March 14, 1913, to a few days after June 1, 1913.

On April 12, 1913, the claimant made an agreement with one Carpenter under which the so-called "Coppenhagen" and "City of Boston" properties were leased to him, Carpenter assuming the claimant's obligations to the over lessors from June 1, 1913, to the end of the terms of the over leases. This disposed of all the properties except the "Stowell" property, which has not been re-let.

I find the rental values on December 9, 1912, of the four properties — and by rental value I mean what the premises were fairly worth for the remainder of the term of the lease to the Butler Company — to be the sum of $1,194,161.90 less the cost of finding a tenant for the properties if that cost is properly to be deducted. This sum of $1,194,161.90 is the exact total of the payments provided for in leases to Perry and Carpenter for the period from April 1, 1913, to the end of the them, less, however, the rent for April and May, 1913, which was lost to the claimant as above explained.

As to the rental value of the "Stowell" property the problem is more difficult. The rent reserved in the lease to the Filene Company was $5200 per annum to January 1, 1913, and $5900 for the remainder of the term, *i. e.*, to January 1, 1918. The premises consisted of the second and third floors of No. 22 Winter Street over Stowell's store, and the second, third and fourth floors of

three buildings on Jackson Place lying in the rear of No. 22 Winter Street and connected with it. The floor area of the second story of No. 22 Winter Street is 3150 square feet. The floor area of the Jackson Place buildings is about 2250 for each floor. The "Stowell" property was connected with the Dexter property by a bridge crossing Jackson Place and entering the second floor of 22 Winter Street.

Edward H. Eldredge, a broker with a considerable knowledge of rental values in the vicinity of this property, testified that in his opinion it would take about a year to secure a tenant for the "Stowell" property taken separately and that you could not expect them to rent it for more than $4800 per year.

Considering all the circumstances I find that the rental value of this property on December 9, 1912, for the rest of the term of five years and twenty-two days was $19,493.53. The difference, therefore, between the rentals and other sums payable under the lease made to the Butler Company from April 1, 1913, to the end of the term (excluding any of the $20,000 per year item) and the rental value of the premises for the same period, and without considering the cost and expenses actually incurred by the claimant in re-letting the premises, amounts to $34,433.47.

14. If in determining the rental values of the properties there should be taken into consideration the actual expenses incurred by the claimant in letting the premises after the failure of the Butler Company, then I find such expenses to be as follows:—

The claimant paid a commission on account of the subletting to Carpenter of $5010.37, and for securing tenants for temporary occupancy, $53.

For advertising the properties the sum of $1261.37 was paid to New York agents, for advertising the "Stowell" property alone the sum of $669.26, and for advertising the properties as a whole the sum of $1776.10.

The claimant also paid its New York agent $954.29 for expenses properly incurred by them in trying to dispose of the property.

The claimant received $26 for use of the premises between April 1, 1913, and June 1, 1913.

15. The taxes upon the "Dexter" and "Coppenhagen" properties assessed as of April 1, 1912, for the year from April 1, 1912, to April 1, 1913, amounted to $22,845.20. The proportion of these taxes for the period from September 4, 1912, to April 1, 1913, was $13,136.99, which sum was paid on November 1, 1912, by the Butler Company to the claimant. The claimant at about the same time paid the owners of these properties the full amount of the taxes aforesaid, that is, the sum of $22,845.20. The proportion of these taxes for the period from November 7, 1912, to April 1, 1913, is $9081.51, and from November 1, 1912, to April 1, 1913, the sum of $9519.92.

16. A question of evidence arose at the hearings. The lease from the Filene Company to the Butler Company mentions in several places various obligations on the part of the Butler Company to pay the sum of $20,000 a year, and especially the obligation of that company — now relied on by the claimant as one element in its claim here presented — in case the lease should be terminated to pay a sum equal to the present value of $20,000 a year for the balance of the term, discounted at 5 per cent. Counsel for the claimant maintained that the correspondence between the parties leading up to the agreement for this lease and the lease, as well as the agreement itself, were competent as bearing upon the construction of the terms of the lease dealing with this item of $20,000 a year, and that this correspondence and agreement showed that the $20,000 was intended by the parties as a bonus or consideration given the Filene Company for making the sub-lease to the Butler Company, and not as part of the rental. Counsel for the receivers, however, contended (1) that it was immaterial whether the item was rental or a bonus, and (2) that since the lease explicitly stated that the $20,000 was to be paid "as rental" and as the lease was carefully and elaborately drawn it was a contradiction of the lease to show that it was not "rental" but a "bonus". I think it is immaterial whether this $20,000 item was intended as a "bonus" or as part of the "rental", but as the court may not agree with me, being of opinion that the evidence objected to is otherwise proper as an aid to enable the court to understand what the parties meant

when they used this language about the $20,000, I admitted the evidence against the objection and subject to the exception of counsel for the receivers. The evidence was as follows: —

Before the execution of the lease to the Butler Company and as part of the negotiations leading up to it the president of the Butler Company sent to the president of the Filene Company a letter, introduced in evidence as Exhibit 31.

The "Eldridge Circular" referred to in this letter was introduced in evidence as Exhibit 32. It was sent out by the agent of the Filene Company in charge of letting the property to prospective tenants at the time.

After the letter from Butler to Filene (Exhibit 31) an agreement was made between the Filene Company and Butler, marked "Exhibit 33", whereby the Filene Company agreed to sublet the properties before mentioned and Butler agreed to take such a sublease. The material provision in this agreement was that —

"the sublease or assignment of leases . . . shall provide for the . . . payment . . . of the rent and other payments by said leases required to be made to the lessors and shall provide for the payment to Filene's in addition to all rentals and other payments called for by said leases, of twenty-thousand (20,000) dollars per year up to February 28th 1921 in monthly instalments of one thousand six hundred and sixty-six and 67/100 (1,666.67) dollars per month, beginning whenever possession of the premises is delivered up, and at the same rate for any fraction of a month."

The time for performing this agreement was extended by mutual consent and on May 29, 1912, the lease (Exhibit 1) was executed in performance of the terms of the agreement.

SUMMARY.

The contentions of the parties are as follows: —

1. The receivers contend that, since there was no breach of the lease until December 2, 1912, the claimant may prove against the assets only for the rent and other payments accruing during the period from November 1 to November 7, 1912 (the date when the receivers were appointed), which amounts to $3739.48 (paragraph 8 above). They also say that if they are entitled, as matter

of law, to set off against this amount such part of the amount paid by the Butler Company on November 1, 1912, on account of taxes as covers the period from November 7, 1912, to April 1, 1913, the amount to be set off is $9081.51, leaving no claim allowable against the assets of the Butler Company.

2. The claimant contends that it may prove for the sum of $215,531.10, made up as follows:—

1. Rent and other payments accruing between November 1 and November 7, 1912 (conceded by the receivers)		$3,739.48
2. Present worth December 9, 1912, of $20,000 per year, discounted monthly at 5 per cent, simple discount (paragraph 11)		137,348.88
3. Rent and payments due under lease (except $20,000 payment) from January 1, 1913, to April 1, 1913, less sums received from subletting (paragraph 12),		39,829.80
4. Difference between rental and other payments in lease (except the $200,000 item) from April 1, 1913, to end of term (paragraph 13)		34,433.47
5. Commissions and expenses of re-letting (paragraph 14)		9,724.39
		$225,076.02
The total of these claims amounts to		$225,076.02
Against this the claimant allows credits as follows:—		
6. Received for subletting after April 1,	$26.00	
7. Taxes in advance (paragraph 15)	9,519.92	9,545.92
Net claim		$215,531.10

At the request of the claimant I report the amount of rent, taxes and insurance payable under the over leases of the five properties as follows:—

Corner . . .	$36,000.00		
Insurance . . .	none		
Taxes . . .	none		
		$36,000.00	
Coppenhagen . .	$22,500.00		
Insurance { fire / rent . . / liability	171.30		
Taxes	6,150.00		
		28,821.30	
Ditson . . .	$22,000.00		
Insurance { fire / rent	253.68		
Taxes . . .	6,642.00		
		28,895.68	
Dexter . . .	$45,000.00		
Insurance . . .	none		
Taxes . . .	16,695.20		
		61,695.20	
[illegible] .	$5,550.00		
[illegible] .	none		
[illegible] .	none		
		5,550.00	
			$160,962 18
[illegible] over leases . . .			20,000.00
			$180,962.18
[illegible] additional to that required in the over leases			1,943.05
			$182,905.23

FRANKLIN T. HAMMOND,
Special Master.

On the twenty-eighth day of said February, the following Exceptions to Master's Report was filed by receivers:—

EXCEPTIONS OF RECEIVERS OF WILLIAM S. BUTLER & COMPANY, INCORPORATED, TO MASTER'S REPORT.

[Filed February 28, 1914.]

William S. Butler & Company, Incorporated, by its receivers excepts to the admission by the master of the evidence set forth in paragraph 16 of his report filed February 21, 1914, and being aggrieved thereby asks that its exceptions may be allowed.

FREDERICK H. NASH,
of Counsel for Charles F. Weed *and others, Receivers of* William S. Butler & Company, Incorporated.

This cause was thence continued to the March Term, A. D. 1914, when, to wit, May 11, 1914, this cause came on to be heard by the court on the exceptions to the master's report on claim of Wm. Filene's Sons Company *v.* William S. Butler & Co., Incorporated, the Honorable Frederic Dodge, Circuit Judge as aforesaid, sitting.

Said cause was thence continued from term to term under advisement to the present September Term, A. D. 1914, when, to wit, October 31, 1914, an opinion of the court is announced.

On the thirtieth day of November, A. D. 1914, the following Decree is entered: —

DECREE.

November 30, 1914.

Dodge, J. This cause came on to be heard at this term upon the receivers' petition for instructions regarding the above-entitled claim, the report of the special master thereon and upon said claim, and the exception of the receivers to said report, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed,—

1. That the receivers' exception to the master's report be and the same hereby is sustained.

2. That the said report is otherwise confirmed.

3. On the facts found in said report that the claim of the said Wm. Filene's Sons Company against the said William S. Butler &

Company, Incorporated, be and the same hereby is allowed in the sum of $3739.48 and disallowed for the balance of said claim.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing decree, Wm. Filene's Sons Company, claimant, claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, and said appeal is allowed accordingly.

OPINION OF THE COURT

ON CLAIM, DISPUTED BY RECEIVERS, OF WM. FILENE'S SONS COMPANY.

OCTOBER 31, 1914.

DODGE, J. The receivers filed a petition for instructions regarding this claim April 7, 1913, which was answered by the claimant company April 8, 1913. By an order entered December 15, 1913, the issues raised were referred to a special master, to hear the parties and their evidence and report thereon. The claim is also one of the disputed claims referred to the same special master by a like order also entered December 15, 1913.

Upon the special master's report, filed February 21, 1914, there has now been a hearing. He has found the facts upon which the questions to be decided depend, and there is substantially no dispute regarding his findings. The manner in which his report has presented the facts is so clear and satisfactory that little restatement will be needed, and I shall deal with them largely by reference to the numbered paragraphs of his report.

The claimant's rights are those which belong to it under the lease described in paragraph 2, made by it to the Butler Company May 29, 1912, of the five parcels of real estate which were together occupied and used by the Butler Company as a department store from September 3 to November 7, 1912. The claimant was tenant,

not owner, of these parcels, and annexed copies of the leases under which it held them (see par. 1) form part of the report, as does its under lease to the Butler Company whereon it bases its present claim. The term for which this under lease was to run expired, as to each parcel, with the expiration of the claimant's estate as tenant under the lease thereof to it. The leases to it have remained in force throughout, and are still in effect. The earliest date of expiration of any of them was December 30, 1917 (par. 2), the latest date is in 1921, so that when all the property and assets of the Butler Company passed into the hands of the receivers in this case by the decree of November 7, 1912, there was a long unexpired term under both leases in the case of each and all the leased properties.

The receivers having on December 5, 1912, declined to adopt the under lease (par. 5), the claimant entered and took possession by leave of court on December 9, 1912 (par. 6), thus terminating the under lease on that day. The claimant had received the rent due under it to November 1. It has also been paid by the receivers for their use and occupation from November 7 to December 9 at the same rate. (See par. 5.) The receivers concede that the claimant is entitled to prove in these proceedings for rent from November 1 to the time of their appointment on November 7 at the monthly rent agreed in the under lease; also for water rates and insurance proportioned upon the same period, in all $3739.48. (Par. 8.) They deny that the claimant has any further provable claim.

The claimant contends that the provisions of the under lease quoted in paragraph 9 give to it the right to prove also for all that would have become payable to it, after its re-entry, according to the under lease, during the full term thereof, had there been no receivership or re-entry, less any rentals under new leases or the estimated rental value of premises not re-let. I am here describing this part of the claim in general terms only. The items composing it, and its total amount, if calculated in the manner contended for, appear in paragraph 2 of the "summary" with which the report

concludes, with references for detailed explanation of the more important items to prior paragraphs of the report.

So far as the claim for anything beyond the amount conceded as above is made up of rent or other payments required of the Butler Company by the under lease, and accruing or to accrue after the claimant's entry in December, 1912, it rests wholly on the Butler Company's covenants, expressed in those provisions of the lease quoted by the master and summarized below, to pay the lessor, upon such re-entry, for or on account of such after-accruing instalments.

These covenants were agreed in the lease to become effective in case the lease should be terminated by such re-entry, and the right so to re-enter was agreed to exist if the lessee should fail to perform. The same right was also agreed to exist if a receiver appointed should stay in over ninety days. The re-entry which has been made was upon a failure of performance caused by the appointment of a receiver; not upon the ground that the receivership had continued ninety days. Failure of performance having given the right to re-enter, and the right having been exercised so as to render the covenant effective, the terms of the covenant purported to give the lessor an election among alternative methods of payment. This election has been made by the presentation of the claim in the form reported by the master.

Whatever the effect of the receivership upon the Butler Company's executory contracts not contained in any lease, it effected no breach of any lease under which that company was tenant, nor did it terminate the company's estate in the premises leased. That it did is not contended in this case. Once it had resulted, however, in a failure of performance in respect to payment of rent, the receivers had lost the right to adopt this lease without the lessor's consent because such failure gave the lessor a right to re-enter and so terminate the lease. *Re Roth & Appel*, 181 F. R. 667, 671. The receivers' election not to adopt, if after such failure, though it may have influenced the lessor as to the time when he would re-enter, seems to be without other bearing upon the question arising.

The order for presentation of claims in this case, under which proof of this claim was first presented to the receivers, was entered November 11, 1912, and it required all creditors to present their claims on or before January 1, 1913, "made up as of November 7, 1912", the date of the filing of the bill and of the receivers' appointment. There have been several extensions of the time thus limited by subsequent orders. The last extension expired December 12, 1913. Obviously there can be no claim as of November 7, 1912, for that which the claimant first got any right to demand on December 9, 1912.

According to the decision of the Court of Appeals for this circuit in *Slocum* v. *Soliday*, 183 F. R. 410, the covenants here relied on gave the lessor no claim provable in bankruptcy for lost rental accruing after its re-entry, had there been bankruptcy on November 7, 1912, instead of this receivership. The covenants relied on in that case were substantially like these, and no circumstances appear sufficient to distinguish the question which would have been here presented from that there decided. The lessor's re-entry was not until after the bankruptcy, and it was held that at the time of the bankruptcy there was only a "contingency that there might be a claim". The same was true here on November 7, 1912. Before December 9, 1912, no claim under the covenants had any existence. It was not merely uncertain as to the amount.

In equity proceedings like these, however, the allowable claims of creditors are not necessarily only those provable as of the date whereon the receivers were appointed. This may be conceded in view of the decision of the Court of Appeals for the Second Circuit in *Penna. etc. Co.* v. *New York etc. Co.*, 198 F. R. 721, 739, 740. Moreover, this claim is being dealt with not only as presented under the order of November 11, 1912, but also as presented by the receivers' petition for instructions and the claimant's answer thereto. There can be no final order of distribution for some time to come. Although both as to existence and amount the claim was too contingent on November 7, 1912, for allowance as of that date, I must consider it allowable in these proceedings now, if it has since that date become allowable. So far as it will be possible

to determine them at all, before final order of distribution, the contingencies which then affected it have now been determined. The lessor has re-entered and has also made its election, by the claim presented, of the particular method, out of those provided for in the covenant, according to which the amount the lessee was to pay should be ascertained in case of such re-entry.

The decision last above cited affords no support for the contention that a claim for rent, accruing or to accrue after the receivership, under a lease which the receivers have declined to adopt, whether or not it has been terminated by the lessor's entry, is ordinarily a claim provable against the estate in proceedings like these. No such claim was allowed in that case, and as the opinion points out (p. 744) there is no analogy between a damage claim for breach of an uncompleted executory contract to furnish transportation services to the insolvent for twenty years (which was allowed), and a claim of damages for loss of unaccrued rent under an unexpired lease. A claim founded on the insolvent railroad's covenant, as lessee, to pay rentals and taxes thereafter to become due from the lessor railroad, was disallowed so far as it related to rentals or taxes becoming due after the lessee's receivers had given up the lease. These, it was held, were too uncertain for allowance; and it was said that "The rule which excludes a demand for future damages for non-payment of rental excludes them." (Page 760, "Crosstown Company's Appeal".) See also *Re Roth & Appel*, 181 F. R. 667, 669; *Slocum* v. *Soliday*, 183 F. R. 410, 411.

In the absence of express provisions such as those quoted by the master from this lease, no allowable claim for future payments under it would in any event have come into being upon or after the lessor's re-entry on December 9, 1912. The receivers would have been bound to pay for their use and occupation, but the lessor would have had no further rights against the estate. The question now to be decided is, whether the lessee's express undertaking in the lease to make payments on account of such unaccrued rent in the event of such re-entry have given the lessor a claim which ought to be here allowed.

A difference beween the parties regarding the interpretation of

those terms of the lease which fix the payments to be made by the lessee while its tenancy continued, is first to be considered. The somewhat unusual character of those terms is accounted for by the fact that the lessor, instead of being owner of the five parcels making up the premises, was itself tenant of each and bound to pay rent, taxes, water rates, etc., therefor under each over lease. The Butler Company, according to its under lease, was to yield and pay "as rental" (1) the aggregate of the rentals, etc., due from this claimant under the five leases referred to, "together with" (2) $20,000 yearly, in equal monthly payments until the expiration of the last over lease at the end of February, 1921. There is no occasion to consider the provisions regulating the precise dates upon which instalments of the "rental" thus composed were to fall due. The claimant contends the yearly payment of $20,000 is not to be treated as "rent" for the purposes of this case, but as a "bonus", payable in instalments; and due, at all events, independently of any tenancy of the premises. The master admitted evidence, against objection, tending to show that both parties so understood the matter in their negotiations before the lease was signed. It does not seem to me that there is any such ambiguity in the terms of the lease as to make such evidence admissible. The whole amount to be paid by the tenant, though made up of both the above elements (1) and (2), is repeatedly referred to in the lease as "rental" or "rent and other payments", and the consequences of failure to meet instalments of (2) when due, were to be the same as in the case of (1). The substance of the bargain was that this claimant, controlling the five different parcels as a whole, let them for $20,000 a year more than the total annual payments which it had itself to make as tenant, requiring this much of the rent reserved to it by the under lease to be paid at all events. The fact that payments under (2) were not to abate upon certain contingencies mentioned which would abate payments under (1), I consider insufficient to require a different conclusion. My ruling is that the evidence admitted should have been excluded, — but even if it is admissible, I do not think it sufficient to show a definite understanding between the parties at the time that the mean-

ing of their agreement should be that for which the claimant now contends. The entire amount of the above payments required from the Butler Company will therefore be hereinafter regarded as rent.

The covenants by the lessee which afford the only basis for the lessor's present claim may be thus summarized:

Upon termination by re-entry, the lessee was to pay $20,000 for each year of the then unexpired term of the under lease on demand, — less a discount of five per cent (elsewhere agreed in the lease to be allowed in case the lessor should exercise a privilege reserved to cancel upon a like payment).

Also at the lessor's election, which he might make or change at pleasure, to pay either —

(*a*) As liquidated damages, sums equal to the rent and other payments called for by the lease at the times therein provided until February, 1921,— less the proper proportion of what might have been paid as above on demand.

(*b*) Or, as damages, the difference between the rental value of the premises when the lessor should exercise its right to elect and the amount of rent and other payments so called for by the lease until February, 1921, less what might have been paid as above on demand.

(The lessor having elected to require payment under (*a*) to April 1, 1913, and under (*b*) from and after that date, a third method of payment which it had the option to elect, viz., (*c*) indemnity against loss of rent and other payments for the unexpired term, taking into account anything paid on demand as above, need not be further mentioned.)

The above covenants may be even more briefly summarized thus: The annual $20,000 payments to be made until 1921 were all to become immediately due and payable, subject to the discount of 5 per cent. Any difference between the rent reserved in the over leases for the whole unexpired term and the rental value of the premises at the time of re-entry was to be paid in addition.

The covenants in question conclude with the following clause: —

"The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency, or receivership proceedings or against any assignee or trustee for the benefit of creditors."

It is, of course, obvious that, in bankruptcy, such an agreement as this, between the bankrupt and one creditor, could in no way assist the provability of the claim. Unless provable under the Bankruptcy Act, the bankrupt's consent thus given could not make it provable. It is no less clear that, in the distribution of an insolvent estate in equity, the court can give no effect to such an agreement. The other creditors, who, in bankruptcy, would have a statutory right to the disallowance of the claim, unless provable under the Act, have here a right to its disallowance unless its own merits, entirely apart from the clause quoted, equitably entitle it to share upon an equal footing with the claims due other creditors interested in the distribution. This, indeed, the claimant is understood to concede.

That the remaining covenants above summarized, for acceleration of the payment of all future rental, etc., upon termination of the lessee's tenancy because of its default, would be valid as between the lessor and lessee alone, does not seem to be disputed; but it does not follow that, in equity, they are to be regarded as giving the lessor a right, equal in merit with the right of those creditors of the lessee whose claims were fixed liabilities absolutely owing when the court took control of the estate, or if then contingent, were so only as to their existence or only as to amount, to share in this distribution for the full amount of all the rent it might have got had the lessee remained its tenant and continued to pay rent until 1921, less the stipulated credits, although it has taken back and is not to restore that estate in the premises whose enjoyment by the Butler Company was to furnish the entire consideration for such rent.

That no such claim could be allowed to share, were the distribution to be made in bankruptcy, has been already stated. The result that there is any such difference between the two systems of distribution, in the principles according to which the respective

merits of competing claims are determined, as will justify the admission of the lessor's claim here because these proceedings are in equity, seems to me one which could only be adopted for convincing reasons, and I am unable to believe that such reasons exist.

The reasons which have been held to forbid the exclusion of claims in proceedings like these, if mature and certain when presented, because they were immature or uncertain in amount on the day when the proceedings were instituted, and to require their allowance if they became mature or their amonnt certain within a time not involving delay in distribution, do not go far enough to require the allowance of a claim which, like this, had no existence on the date referred to, but has since come into existence through subsequent dealings wholly between the insolvent and the particular creditor, relating wholly to a leasehold interest forming no part of the estate to be distributed, and is dependent not only for its existence, but also as to the time at which it should come into existence and as to its amount, upon election by the creditor while these proceedings were pending. It is not sufficient for the allowance of such a claim to say that it is presented in time and is not to be excluded because it was not certain at some arbitrary anterior date. It does not seem to me that it is such in its nature as to entitle it to rank with liabilities incurred prior to or concurrently with the receivership, whether then mature or immature, certain or contingent.

If it be said that the dealings referred to were in pursuance of express agreements made and publicly recorded before the institution of these proceedings, — so far as these agreements expressly purported to make such a claim provable in case there should be proceedings like these they are admittedly of no effect here. But the purpose expressly declared in the clause referred to, of enabling the lessor, at his option, to make all the rent for the entire unexpired term due and provable at once in case of insolvency, is sufficiently obvious without it from the other agreements relied on, default on the lessor's part being far more likely to result from its future insolvency than from any other cause. A liability arising after insolvency out of agreements thus designed to give one cred-

itor an advantage in case of insolvency, which being for future rent under an unexpired lease could not otherwise be claimed, I cannot regard as equitably allowable to the prejudice of creditors claiming upon liabilities not so arising. In bankruptcy such an agreement has been regarded as "a way of contracting for a preference" and providing a mode of thwarting the provisions of the Act. *Re Merwin & Willoughby Co.*, 206 F. R. 116, 120.

The above objections to the provability of the claim in these proceedings are in no way avoided, so far as I can see, by the fact that, according to the agreements, the payments called for were to be made as "damages" or "liquidated damages". Notwithstanding the use of these terms, it remains none the less true that acceleration of all the future instalments of rent under the lease, irrespective of any tenancy by the lessee, is what was in substance provided for. See *Watson* v. *Merrill*, 136 F. R. 359, 361; *Bowditch* v. *Raymond*, 146 Mass. 109, 115.

In view of the above considerations, my conclusion must be that no claim for the accelerated rentals under the agreements referred to is allowable.

That some elements of conjecture or speculation must of necessity enter into any determination by estimate in advance, of rental values for terms extending so far into the future as these, seems obvious. I am further inclined to agree with the contention of the receivers that, particularly in regard to so much of the instalments to be accelerated as above as was to make up the annual payments of $20,000 per year, the agreements relied on resemble in character agreements for a penalty or forfeiture on termination of the lease, rather than agreements for indemnity. Less an agreed discount, payment of the $20,000 per year to the end of the term was required at all events, even in case of re-letting by the lessor for more than the over leases required it to pay as tenant. Further reasons are afforded by these considerations against the allowance of such a claim in any respect.

The claim presented by the creditor is allowed in the amount of $3739.48, admitted as above stated, and is otherwise disallowed. The receivers fail to satisfy me that they are entitled to any set-

off against the amount thus allowed on account of the taxes for 1912 paid by the Butler Company on November 1, 1912, according to paragraph 15 of the master's report.

The result reached renders it unnecessary to discuss any of the other questions raised by the report.

CLAIM OF APPEAL.

[FILED DECEMBER 17, 1914.]

Now comes the Wm. Filene's Sons Company, claimant herein, and alleging itself to be aggrieved by the decree, entered herein in the matter of its claim, of November 30, 1914, in the above-entitled proceedings, does hereby appeal from said decree to the United States Circuit Court of Appeals for the First Circuit, and from each and every part of said decree, for the reasons set forth in the assignment of errors which is filed herewith, and prays that this its claim of appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for WM. FILENE'S SONS COMPANY.

ASSIGNMENT OF ERRORS.

[FILED DECEMBER 17 1914.]

And now comes the above-named claimant, Wm. Filene's Sons Company, and files the following assignment of errors, upon which it will rely in the prosecution of its appeal from the decree made in the above-entitled case and entered herein on November 30, 1914.

The court was in error: —

I. In refusing to allow as provable the claim of this claimant for damages arising out of the breach by William S. Butler & Company, Incorporated, of the lease and agreement referred to in the claim filed herein and the entry and termination of the said lease and agreement by reason of said breach.

II. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums (not including the $20,000 payment) due under the lease from the claimant to William S. Butler & Company, Incorporated, from December 9, 1912, to the end of the term and the rental value on said date of the premises demised under said lease.

III. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums (not including the $20,000 payment) due under the lease from the claimant to William S. Butler & Company, Incorporated, from April 1, 1913, to the end of the term and the rental value on said date of the premises demised under said lease.

IV. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums due under the lease from the claimant to William S. Butler & Company, Incorporated, from December 9, 1912, to the end of the term and the rental value on said date of the premises demised under said lease.

V. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums due under the lease from the claimant to William S. Butler & Company, Incorporated, from April 1, 1913, to the end of the term and the rental value on said date of the premises demised under said lease.

VI. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the value on December 9, 1912, of the sum of $20,000 per annum payable in monthly payments for the balance of the term of the lease above referred to, less a discount of 5 per cent in accordance with the terms of the said lease.

VII. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for the rent and other payments (excepting the $20,000 payment) due to the claimant under the terms of the lease above referred to for the period from January

1, 1913, to April 1, 1913, less the sums received from sub-letting the demised premises during said times as set forth in the report of the special master herein.

VIII. In refusing to allow the claim of this claimant in a sum greater than $3739.48.

IX. In not allowing the said claim of the said claimant in the sum of $215,531.10, as set forth in the summary at the end of the report of the special master herein.

X. In sustaining the exception of the receivers to the master's report.

XI. In excluding evidence of the negotiations leading up to the execution of the lease referred to in the claimant's claim filed herein, which evidence was in substance as follows, as reported by the special master:—

"Before the execution of the lease to the Butler Company and as part of the negotiations leading up to it the president of the Butler Company sent to the president of the Butler Company a letter, introduced in evidence as Exhibit 31.

The 'Eldridge Circular' referred to in this letter was introduced in evidence as Exhibit 32. It was sent out by the agent of the Filene Company in charge of letting the property to prospective tenants at the time.

After the letter from Butler to Filene (Exhibit 31) an agreement was made between the Filene Company and Butler, marked "Exhibit 33", whereby the Filene Company agreed to sublet the properties before mentioned and Butler agreed to take such a sublease. The material provision in this agreement was that

> 'the sublease or assignment of leases . . . shall provide for the . . . payment . . . of the rent and other payments by said leases required to be made to the lessors and shall provide for the payment to Filene's in addition to all rentals and other payments called for by said leases, of twenty-thousand (20,000) dollars per year up to February 28th 1921 in monthly instalments of one thousand six hundred and sixty-six and 67/100 (1,666.67) dollars per month, beginning whenever possession of the premises is delivered up, and at the same rate for any fraction of a month.'

The time for performing this agreement was extended by mutual consent and on May 29, 1912, the lease (Exhibit 1) was executed in performance of the terms of the agreement."

By its Attorneys,

BRANDEIS, DUNBAR & NUTTER.

BOND ON APPEAL.

[Filed December 17; Approved December 18, 1914.]

Know all Men by these Presents, that we, Wm. Filene's Sons Co. a corporation duly organized under the laws of the Commonwealth of Massachusetts, as principal, and the New England Casualty Company, a corporation organized under the laws of the Commonwealth of Massachusetts and having a usual place of business in Boston in the County of Suffolk and said Commonwealth, as surety, are held and firmly bound unto Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers of William S. Butler & Co. Inc. in the full and just sum of Two Hundred and Fifty and $\frac{00}{100}$ Dollars to be paid to the said Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers as aforesaid and their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, and our successors, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of December in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a District Court of the United States for the District of Massachusetts in a suit in equity depending in said Court between Isaac McLean Sons Co. and William S. Butler & Co., Inc., wherein said Wm. Filene's Sons Co. appeared as claimant a decree was entered against the said Wm. Filene's Sons Co. and the said Wm. Filene's Sons Co. having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers as aforesaid citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the First Tuesday of January, 1915.

Now, the condition of the above obligation is such, that if the said Wm. Filene's Sons Co. shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal

good, then the above obligation to be void; else to remain in full force and virtue.

WM. FILENE'S SONS CO.,

[SEAL] *By* E. J. FROST, *V. Pt.*

NEW ENGLAND CASUALTY COMPANY,

[SEAL] *By* BERTRAM G. WATERS, *Resident Vice President.*

Attest: ROBERT N. SHAW, *Resident Asst. Secretary.*

Sealed and delivered in presence of

Approved: FREDERIC DODGE,
U. S. Cir. J.

We do not care to be heard on the approval of the above bond.

CHOATE, HALL & STEWART,
Attorneys for Receivers.

STIPULATION, PRAECIPE AND ORDER.

STIPULATION.

[FILED DECEMBER 17, 1914.]

It is stipulated that the annexed praecipe enumerates all the papers necessary to the decision of the questions presented by the appeal to be made herein from the order of the court of November 30, 1914.

It is consented that the claimant may appeal to the Circuit Court of Appeals from the order entered herein on November 30, 1914, and that all proceedings under said order shall be stayed until the hearing and determination of said appeal and the coming down of the mandate without the filing of any supersedeas bond.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for the Claimants.

CHOATE, HALL & STEWART,
Attorneys for the Receivers.

PRAECIPE.

[FILED DECEMBER 17, 1914.]

Bill of complaint.

Answer thereto.

Decree thereon.

Order of November 11, 1912, as to proof of claims.

Decree appointing co-receiver.

Petition of Wm. Filene's Sons Company December 9, 1912, for leave to enter.

Decree allowing same.

Petition of receiver December 17, 1912, for leave to sell merchandise.

Decree on said petition December 26, 1912.

Petition for instructions of receivers with reference to claim of Wm. Filene's Sons Company filed April 7, 1913.

Answer of Wm. Filene's Sons Company thereto.

Claim of Wm. Filene's Sons Company.

Abstract of over leases.

Orders extending time for proving claims:

December 17, 1912.
January 6, 1913.
February 11, 1913.
March 24, 1913.
April 29, 1913.
May 26, 1913.
July 1, 1913.
July 24, 1913.
August 27, 1913.
December 15, 1913.

Order referring claim of Wm. Filene's Sons Company to special master.

Exhibits 31, 32 and 33 introduced before the special master.

Order as to first dividend December 31, 1913.

Report of special master on claim of Wm. Filene's Sons Company.

Exception of receivers thereto.
Decree of District Court November 30, 1914.
Claim of appeal and allowance.
Assignment of errors.
Citation.
Clerk's certificate.
Order of District Court as to record and security.

ORDER.

DECEMBER 18, 1914.

DODGE, J. All proceedings under order of November 30, 1914, to be stayed until the hearing and determination of this appeal and the coming down of the mandate without the filing of any supersedeas bond, pursuant to stipulation.

Attest: JOHN E. GILMAN, Jr., *Deputy Clerk*.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles F. Weed, of Brookline; Milroy H. Gibson, of Boston, and Edward B. Wilson, of Newton, all of Massachusetts, Receivers of Wm. S. Butler & Co., Inc., Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fifth day of January next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Wm. Filene's Sons Company, a corporation organized under the laws of Massachusetts, in 1903, claimant against Wm. S. Butler & Company, Inc., in the cause in equity entitled No. 396, Isaac McLean Sons Co. v. Wm. S. Butler & Co., Inc., is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this eighteenth day of December, in the year of our Lord one thousand nine hundred and fourteen.

FREDERIC DODGE,
U. S. Circuit Judge.

Acknowledgment of Service on Citation.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, December 21, 1914.

Service of the within citation is hereby acknowledged.

CHARLES F. WEED,
MILROY H. GIBSON, AND
EDWARD B. WILSON,
Receivers of Wm. S. Butler & Co., Inc.,
By Their Attorneys, CHOATE, HALL & STEWART.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the matter of the Claim of Wm. Filene's Sons Company, filed in the cause in equity entitled,

No. 396.

ISAAC MCLEAN SONS COMPANY, Complainant,
v.
WILLIAM S. BUTLER & COMPANY, INCORPORATED, Defendant,

now pending in said District Court, the Opinion of the Court, dated October 31, 1914, the Claim of Appeal, the Assignment of Errors, the Bond on Appeal, Stipulation, Præcipe and Order, and also the original Citation issued upon the appeal of Wm. Filene's Sons Company, claimant in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said District Court, at Boston, in said district, this twenty-ninth day of December, A. D. 1914.

[SEAL.] WILLIAM NELSON, *Clerk.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1101.

WM. FILENE'S SONS COMPANY, Claimant, Appellant,
v.
CHARLES F. WEED et al., Receivers, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Putnam, Bingham and Brown, JJ.

Opinion of the Court.

December 9, 1915.

BROWN, *J.:*

We all agree that the judgment of the court below should be affirmed, though there is a difference of opinion as to the precise grounds upon which the affirmance should rest. A majority of the court agree with the reasoning of the court below, and adopt its opinion as the opinion of this court.

In view of the argument for the appellant, it may be useful to state certain reasons which seem to support the judgment of the District Court.

The nature of the covenant was explained in Slocum v. Soliday, 183 Fed. 410, 412. It has no operation except from the time when the lessor entered upon the premises as provided therein. The recording of the lease, with the implied notice to other creditors of its terms, does not assist the appellant. On the contrary, it informed other creditors that so long as the lease was in effect, either because

the lessee had a right to prevent a cancellation, or because the lessor, though having the right to cancel, did not exercise it, any claim under the covenant for indemnity was non-existent, and did not affect the lessee's solvency.

Other creditors could not have counted the appellant as a creditor for the purpose of showing that the lessee's debts exceeded its assets, or for instituting proceedings in bankruptcy or insolvency, and were entitled to give credit in reliance upon the fact that, so long as the relation of lessor and lessee continued, the lessor could be a creditor only for installments of rent as they fell due. They were also, in giving credit, entitled to rely not only upon the fact that the claim had no existence, but upon the fact that a debt first arising after bankruptcy proceedings could not share with them in a distribution of assets; and that, so far as the covenant attempted to create a debt to which bankruptcy was a condition precedent, it contravened the bankruptcy laws and was wholly ineffective against them.

Courts of bankruptcy and of equity alike recognize the fundamental equity of equality between creditors, in the distribution of assets, which arises when assets have become insufficient to pay all in full. Both enforce this equity by assuming the control of assets and by stopping, from the time their aid is invoked, the creation of new debts to be paid out of assets. Credit upon the faith of assets is stopped by the filing of a bankruptcy petition or a petition in equity which seeks either primarily or in the alternative a pro rata distribution of assets.

The covenant for payment after bankruptcy or insolvency, upon which appellant now relies, was not, as is contended, entered into upon the faith of the lessee's assets. The lease may have been entered into with more or less consideration of solvency and reliance upon assets, though insolvency was guarded against by reservation of a right to cancel, but the covenant for indemnity was no part of the lease proper, but a substitutional contract to take effect, if ever, only after termination of the lease, and only after the realization of a loss. While there was a possibility of its application during the lessee's solvency, we are not in this case concerned with that aspect, but with the covenant as a provision intended to become effective after the lessor had cancelled the lease, not for a voluntary breach during the lessee's solvency, but because of bankruptcy, insolvency or a receivership.

In this aspect the lessor has in substance only a personal promise to pay after personal ability to pay is gone.

Persons doing business with a corporation trust it, not as the appellant contends, upon the faith of its assets, but upon the faith of an excess of assets over its existing obligations. Knowledge of the amount of indebtedness is as important as knowledge of assets.

Persons were entitled to give credit to the lessee regardless of the mere possibility of a future debt, and if credit was given in ordinary course until their debts exceeded assets, this fact gave rise to an equitable right to distribution among them of the assets upon which they relied for payment, for the enforcement of which they might

resort to the bankruptcy court or to a court of equity. This right after it is once asserted by petition or bill cannot be impaired or diminished by a debt which did not come into being until the assets were insufficient to pay those creditors who had contracted with the lessee upon the assumption of solvency.

As rent was paid up to the filing of the creditors' bill, the creditors were entitled to assert that no breach occurred by act of the lessee before they asserted their right to the assets. For a breach after this time the lessor must look to the personal responsibility of the lessee at the time of breach. The reason for the rule is the same in bankruptcy and in equity. The claim arises too late.

It is not true that the lessor has a claim for damages for a breach of contract for the entire term of the lease, for it terminated the lease and cut off the future term by its own election. The substitutional covenant, which takes effect after the relation of landlord and tenant is terminated, is what the former lessee has not performed, and upon this rests the appellant's claim. The former lessee has lost its control over its assets, since those creditors who trusted it on the faith of its assets, and with knowledge that the covenant had created no debt, have asserted their right to the assets.

Exactly what was contemplated as one condition precedent to the right of cancellation has happened: custody of the assets for the benefit of creditors who are, as the appellant is not, entitled to say "we trusted the lessee upon the assumption of solvency and ability to apply its assets in payment of our claims."

The covenant is inherently weak and insufficient to give a claim to share in assets, for it is a provision for a time when the assets of the lessee are gone from its hands. The lessor, however, still has all that it contracted for in this event,—the personal obligation of the lessee.

In substance the covenant is one of indemnity or insurance,—a covenant to indemnify the lessor against loss occasioned by the lessee's bankruptcy or insolvency. The lessee insures the lessor for the loss occasioned by the lessee's own inability to pay the agreed rent for the full period.

A claim based upon a promise to pay "after I have become a bankrupt or insolvent the loss occasioned by my bankruptcy" cannot be permitted to share equally with other claims merely on the ground that those who give credit on the faith of assets should be permitted to share in the pro rata distribution of those assets.

This ground upon which the appellant bases its argument for an equitable right to a share in the assets is, however, a good ground for preferring the claims of other creditors. As it is obvious that in framing the provision for bankruptcy or insolvency and for a cancellation of the lease the lessor did not rely upon the lessee's possession of assets to pay with at the time when the debt might arise, this is a sufficient reason for holding that the claim cannot compete equitably with the claims of ordinary creditors.

As a device for the creation of a debt which it is not expected that the lessee can pay, but which, as the lease in terms clearly indicates, is to be used in competition with other prior creditors in sharing

assets,—as a device to become a creditor ex post facto,—it is wholly ineffective.

The claim was rightly disallowed, because the appellant did not become legally or equitably a creditor before other creditors had become entitled both under the bankruptcy act and upon equitable principles to all the assets for pro rata distribution, and because the appellant did not rely upon the assets of the lessee for the performance of the covenant of indemnity, as appears by the covenant itself, which contemplates both the creation and payment of a debt after all the lessee's assets are required to pay prior creditors.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

PUTNAM, *J.*:

I concur in the result. The District Court applied to this case the rule of Slocum v. Soliday, 183 Fed. Rep. 410, 412. I do not know whether the case is governed by this rule or not; but, in the absence of authorities otherwise, I feel bound by it. The application of this case cuts up all the further reasoning contained in this opinion of the court. Therefore, I concur that the case is governed by Slocum v. Soliday, and decline to enter into further discussion.

On April 20, 1915, Honorable Arthur L. Brown, District Judge, was assigned to sit in this case. This case came on to be heard April 20 and 21, 1915, before Honorable William L. Putnam, Honorable George H. Bingham, Circuit Judges, and Honorable Arthur L. Brown, District Judge.

Thereafter, to wit, on the ninth day of December, A. D. 1915, the Opinion of the Court (page 93) was announced, a concurring opinion by Putnam, J., was filed and the following Final Decree was entered:—

Final Decree.

December 9, 1915.

This case came on to be heard April 20 and 21, 1915, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, December 9, 1915, here ordered, adjudged and decreed as follows: The decree of the District — is affirmed, and the appellees recover their costs of appeal.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

Thereafter, to wit, January 6, 1916, the following Stipulation and Motion were filed:—

Stipulation.

[Filed in Circuit Court of Appeals January 6, 1916.]

In the above-entitled matter the Wm. Filene's Sons Company hereby represents that it proposes to file in the Supreme Court of the United States a petition for a writ of certiorari directed to this court in this cause, and said Wm. Filene's Sons Company hereby stipulates that it will file the said petition not later than February 1, 1916.

WM. FILENE'S SONS COMPANY,
By BRANDEIS, DUNBAR & NUTTER,
Attorneys.

Motion.

[Filed in Circuit Court of Appeals January 6, 1916.]

The Wm. Filene's Sons Company having represented that it proposes to file a petition in the Supreme Court of the United States for a writ of certiorari directed to this court in this cause, and having stipulated that it would file the said petition not later than February 1, 1916, now, therefore, the said Wm. Filene's Sons Company moves that if the said Wm. Filene's Sons Company shall file a petition for a writ of certiorari, as aforesaid, before February 1, 1916, that the mandate herein be stayed pending the said petition for a writ of certiorari and until further order of this court.

By Its Attorneys, BRANDEIS, DUNBAR & NUTTER.

On the same day, to wit, January 6, 1916, the following Order of Court was entered:—

Order of Court.

January 6, 1916.

The Wm. Filene's Sons Company having represented that it proposes to file a petition in the Supreme Court of the United States for a writ of certiorari directed to this court in this cause, and having stipulated that it would file the said petition not later than February 1, 1916, and it appearing that the appellees assent to the entry of the following order, It is ordered that if the said Wm. Filene's Sons Company shall file a petition for a writ of certiorari, as aforesaid, before February 1, 1916, that the mandate herein be stayed pending the said petition for a writ of certiorari and until the further order of this court.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

We assent to the entry of the foregoing order.

CHARLES F. WEED ET AL., *Receivers,*
By CHOATE, HALL & STEWART, *Attorneys.*

December 29, 1915.

Clerk's Certificate.

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 99, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including January 12, 1916, in the cause numbered and entitled,

No. 1101.

WM. FILENE'S SONS COMPANY, Claimant, Appellant,
v.
CHARLES F. WEED et al., Receivers, Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of January, A. D. 1916.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which William Filene's Sons Company is appellant, and Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers of William S. Butler & Company, Inc., are appellees, No. 1101, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the second day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,110. Supreme Court of the United States. No. 827, October term, 1915. William Filene's Sons Company vs. Charles F. Weed et al., Receivers, etc. Writ of Certiorari.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a certified copy of a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of the record herein on file in the office of the Clerk of the Supreme Court of the United States in the matter of Wm. Filene's Sons Company, Petitioner for Certiorari v. Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers, Respondents, and there numbered 827 (October Term, 1915) upon the docket of said court, may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said cause."

In testimony whereof, I, Francis M. Fogarty, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this sixth day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

United States Circuit Court of Appeals for the First Circuit.

No. 1101.

WM. FILENE'S SONS COMPANY
v.
CHARLES F. WEED, MILROY H. GIBSON, and EDWARD B. WILSON, Receivers of Wm. S. Butler & Co., Inc.

Stipulation.

(Filed March 6, 1916.)

In the above-entitled action it is hereby stipulated that the certified transcript of the record herein on file in the office of the Clerk

of the Supreme Court of the United States in the matter of Wm. Filene's Sons Company, Petitioner for Certiorari v. Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers, Respondents, and there numbered 827 (October Term, 1915) upon the docket of said court, may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case.

CHOATE, HALL & STEWART,
CHARLES F. CHOATE, JR.,
FREDERICK H. NASH,
Attorneys for Receivers.
BRANDEIS, DUNBAR & NUTTER,
Attorneys for Wm. Filene's Sons Company.

Attest:
A true copy:

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/6/1916. F. M. F.]

[Endorsed:] File No. 25,110. Supreme Court U. S., October term, 1915. Term No. 827. William Filene's Sons Company, petitioner, vs. Charles F. Weed et al., receivers, etc. Writ of certiorari and return. Filed March 8, 1916.

FILED
FEB 7 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 93

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RESPONDENTS.

PETITION, AND BRIEF IN SUPPORT OF PETITION, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
GEORGE R. NUTTER,
J. BUTLER STUDLEY,
JACOB J. KAPLAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 827.

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
GEORGE R. NUTTER,
J. BUTLER STUDLEY,
JACOB J. KAPLAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner the Wm. Filene's Sons Company respectfully represents:

First. Your petitioner is and at all times hereinafter mentioned was a corporation duly organized under the laws of the Commonwealth of Massachusetts and had its usual place of business in Boston in said Commonwealth, and the respondents are Charles F. Weed, Milroy H. Gibson, and Edward B. Wilson, all of said Boston, Receivers of Wm. S. Butler & Company, Inc., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, appointed under decrees of the District Court of the United States for the District of Massachusetts.

Second. On November 7, 1912, the Isaac McLean Sons Company, a creditor of the said Wm. S. Butler & Company, Inc., filed a bill of complaint against the said Wm. S. Butler & Company, Inc., in the District Court of the United States for the District of Massachusetts, seeking the appointment of receivers and praying that the respective debts of the complainant and all other creditors of said company who joined in the proceedings might be established, and that the assets of the said Wm. S. Butler & Company, Inc., might be equitably applied as the Court might direct in satisfaction thereof (Record, pp. 2–5). It was not alleged in said bill of complaint that said Wm. S. Butler & Company, Inc., was insolvent. On said November 7, 1912, said Wm. S. Butler & Company, Inc., admitted the allegations of said bill and submitted itself to the Court (Record, p. 5). The Court thereupon on said November 7, 1912, appointed the said Charles F. Weed and the said Milroy H. Gibson receivers of said corporation, and said receivers

duly qualified. On December 3, 1912, the respondent Edward B. Wilson was appointed co-receiver and qualified (Record, pp. 6, 8).

Said receivers in each case were appointed to continue the business and conserve the assets of the companies involved, and there is nothing contained in the decrees appointing the various receivers conferring any power on them to wind up such companies, or indicating that winding up proceedings were contemplated.

Third. On November 11, 1912, the said District Court upon an *ex parte* petition ordered that all creditors of said Wm. S. Butler & Company, Inc., present their claims, made up as of November 7, 1912, to the receivers on or before January 1, 1913, and that all persons whose claims were not so presented should be barred from participating in the distribution of the assets in the hands of the receivers unless the Court should for good cause otherwise order (Record, p. 7).

Fourth. The said order was thereafter from time to time modified by extending the time within which claims might be proved until December 15, 1913, when an order was entered by said District Court extending the time for filing proofs of claims as aforesaid *nunc pro tunc* to December 12, 1913 (Record, p. 59).

On December 17, 1912, the receivers of Wm. S. Butler & Company, Inc., filed a petition with said District Court for leave to sell the assets of said Wm. S. Butler & Company, Inc., and the Court on December 26, 1912, authorized them to do so (Record, pp. 12 and 13).

All the assets of the company have been sold and converted into cash, and there is not sufficient to pay creditors in full, even though the claims of your petitioner are not allowed.

Fifth. Your petitioner herein is a claimant, seeking the right, as creditor of the said Wm. S. Butler & Company, Inc., to share in the assets in the hands of said receivers. Said claim was filed for proof on September 30, 1913 (Record, p. 21). Prior thereto, on the seventh day of April, 1913, the said receivers had filed a petition in said District Court for instructions as to the nature and validity of the claim of this petitioner, and on the eighth day of April, 1913, the petitioner filed an answer to said petition of the receivers for instructions asserting a claim similar to that thereafter filed by it as aforesaid (Record, pp. 14–20).

Sixth. The facts upon which said claim is based are undisputed, and were found by a Master upon a reference by said District Court (Record, pp. 60–72), and are in substance as follows:

Prior to May 29, 1912, the predecessor of the petitioner, a corporation of the same name to whose rights the petitioner duly succeeded prior to September 1, 1912, was the lessee of five adjoining, connecting buildings in the City of Boston and State of Massachusetts. On May 29, 1912, the said Wm. Filene's Sons Company executed a sub-lease of these buildings to the said

Wm. S. Butler & Company, Inc., under a written lease (Record, p. 29) for a term expiring February 27, 1921, and in consideration thereof the said Wm. S. Butler & Company, Inc., assumed the obligations of said Wm. Filene's Sons Company to its overlessors, and in addition agreed to pay $20,000 yearly in monthly instalments to the said Wm. Filene's Sons Company. Occupation and rent as aforesaid commenced September 3, 1912. Said lease contained the following clauses:

"Provided also, and these presents are upon the condition that if the lessee shall neglect or fail to perform and observe any of the covenants, agreements, terms or conditions contained in this instrument . . . or if the lessee shall be declared a bankrupt or insolvent according to law . . . or a receiver appointed of its property, and not discharged within ninety days, then . . . said lessor . . . may . . . enter into and upon said premises . . . and upon entry as aforesaid this lease shall be determined. . . . And said lessee covenants and agrees, as aforesaid, that in case of such termination or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will pay to the lessor upon demand a sum equal to twenty thousand (20,000) dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one (1) day added (less the five (5) per cent. discount, as aforesaid), and will, at the election of the lessor, which election may be made or changed at any time, either:

(*a*) Pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same instalments, or if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in each case, however, such sum paid under the preceding clause as represents a part of such instalment, or,

(*b*) Pay to the lessor, as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however, such sum as has been paid for the same period under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof, or

(*c*) Indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid during the residue of the term, taking into account any sum paid under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof unexpired.

The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency or receivership proceedings or against any assignee or trustee for the benefit of creditors."

The receivers who had been appointed November 7, 1912, as aforesaid failed to pay the rent which came due on December 1, 1912, and on December 5, 1912, the receivers elected not to affirm the lease.

On December 9, 1912, the Wm. Filene's Sons Company by leave of Court entered upon the aforesaid premises and terminated the said lease by reason of the failure of the said Wm. S. Butler & Company, Inc., to pay the rent due December 1, 1912.

The receivers continued to occupy the premises until January 1, 1913. After the receivers had vacated the said premises the Wm. Filene's Sons Company made all proper efforts to relet the premises and finally did relet the larger part of the premises on or about April 1, 1913, for a term commencing some time thereafter for the amount of the rent due to its overlessors but not including the twenty thousand dollars per annum payable under the said lease.

On December 9, 1912, the date of the entry and termination of the lease, the difference between the rental value of said premises and the rent reserved as found by the Master was (less credits) $215,530.08. Said damages accrued on December 9, 1912, and were then fixed. From December 9, 1912, to December 12, 1913, the last day set for proving claims, the said Wm. Filene's Sons Company actually lost in sums otherwise payable under the terms of the said lease to the said Wm. S. Butler & Company, Inc., the sum of $89,571.28 as found by the Master. Said damages are included in said sum of $215,530.08 and were fixed and accrued prior to the last day set for proving claims.

The said Wm. Filene's Sons Company sought to prove in the said receivership proceedings, its claims for all or such part of the damages accruing as aforesaid prior to the last day set for proving claims as in equity was proper, and asserted the same claim in answer to the petition for instructions filed by the said receivers as aforesaid.

Seventh. On November 30, 1914, the said District Court entered a decree disallowing the said claim for any sums of money or damages which might have accrued after the seventh day of November, 1912 (Record, p. 73). Thereupon an appeal was taken by said petitioner to the United States Circuit Court of Appeals for the First Circuit and said appeal was heard in said court in April, 1915, and thereupon on or about December 9, 1915, the said United States Circuit Court of Appeals for the First Circuit decided to affirm said decree of the said District Court pursuant to an opinion handed down December 9, 1915 (Record, pp. 93–97), and pursuant to said decision a decree of affirmation was entered on December 9, 1915 (Record, p. 98), and is the decree which your petitioner seeks to have reviewed by this Supreme Court of the United States.

Eighth. Two of the Judges, namely, Judge Bingham and Judge Brown, of the United States Circuit Court of Appeals for the First Circuit, adopt the opinion of the District Court (Record, pp. 74–84) and also base their decision upon the ground that the claimant was not an existing creditor at the time of the appointment of the receivers; that this claim, if any, arose after the appointment of the receivers and was not of a nature to entitle it to share ratably with the other creditors of the said Wm. S. Butler & Company, Inc. (Record, pp. 93–97).

Ninth. One of the Judges of said Circuit Court of Appeals, namely, Judge Putnam, concurred in the result but based his decision upon the ground that the case was governed by *Slocum* v. *Soliday*, reported 183 Fed. R. 410, a decision by the Circuit Court of Appeals for the First Circuit disallowing the proof of a similar claim in bankruptcy proceedings under the Bankruptcy Act of 1898 (Record, p. 97).

Tenth. Your petitioner is advised and alleges that the decision of the Circuit Court of Appeals of the First Circuit affirming the decree of the District Court of the United States for the District of Massachusetts and disallowing the claim of the petitioner for matters which accrued after the date of the appointment of the receivers is erroneous and should be reviewed by this Court:

1. Because the decision of the Circuit Court of Appeals for the First Circuit is inconsistent with the principles laid down in the decisions of this Court in the cases of *International Trust Co.* v. *Weeks*, 203 U.S. 364, and *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U.S. 1.

2. Because the decision of the Circuit Court of Appeals for the First Circuit conflicts with the principles laid down in the decisions of the Circuit Court of Appeals for the Second Circuit in the case of *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, reported in 198 Fed. Rep. 721, 735, 747, 756, 761, 765; 204 Fed. Rep. 513; 216 Fed. Rep. 458.

3. Because said decision is inconsistent with the principles laid down in the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Martin* v. *Orgain*, reported in 174 Fed. R., page 772.

4. Because the decision of the Circuit Court of Appeals for the First Circuit is inconsistent with the principles laid down in the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Ludlow* v. *Pugh*, reported in 213 Fed. R., page 450.

5. Because the decision of the Circuit Court of Appeals for the First Circuit is inconsistent with the principles laid down in the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *in re Desnoyers Shoe Co.* reported 227 Fed. R., page 401.

6. Because the decision of the Circuit Court of Appeals for the First Circuit is inconsistent with the principles laid down by the Supreme Judicial Court for the Commonwealth of Massachusetts in the cases of *Deane* v. *Caldwell*, 127 Mass. 242, *Way* v.

Reed, 6 Allen, 364, *Woodbury* v. *Sparrell Print*, 187 Mass. 426, *Edmands* v. *Rust & Richardson Drug Co.*, 191 Mass. 123.

7. Because said decision is contrary to the true principles of law and equity pertaining to the question involved.

8. Because said decision involves questions of importance and general interest, namely:

(*a*) The provability in equity receivership proceedings of insolvent corporation of claims under existing contracts which did not arise and become fixed and determined until after the filing of the bill but before the expiration of the date limited for the proof of claims therein and particularly claims arising as aforesaid upon leases or agreements in the nature of leases of real or personal property either under said covenants or under the ordinary terms of such leases;

(*b*) The question whether the analogy of the bankruptcy act is to be followed in such receivership proceedings;

(*c*) The question whether said claims are provable in bankruptcy proceedings under the Bankruptcy Act of 1898.

The probable dividend upon the claim of your petitioner if the same is allowed in full is not less than $30,000.

Eleventh. Your petitioner makes a part of this petition the reported decisions hereinbefore referred to and submits a certified copy of the record of said Circuit Court of Appeals, of the decree therein, and of the opinion of said Court, and a brief in support of this petition.

WHEREFORE your petitioner respectfully prays: That a writ of certiorari may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit requiring said Court to certify and send to this Honorable Court on a day certain to be therein designated a full and complete transcript of record and of the proceedings in said Circuit Court of Appeals for the First Circuit in said case entitled therein Wm. Filene's Sons Company *v.* Charles F. Weed and others, Receivers, numbered 1101, to the end that said case may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may have such other and further relief or remedy and processes in the premises as to this Honorable Court may seem meet.

WM. FILENE'S SONS COMPANY,

By

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
GEORGE R. NUTTER,
J. BUTLER STUDLEY,
JACOB J. KAPLAN,

Its Solicitors.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss.:

George R. Nutter being duly sworn deposes and says that he is one of the attorneys for the above named Wm. Filene's Sons Company; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

GEORGE R. NUTTER.

Subscribed and sworn to before me by George R. Nutter this 27th day of January, 1916.

ALFRED L. FISH,
Notary Public.

[SEAL.]

My Commission expires December 10, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 827.

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RECEIVERS, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
GEORGE R. NUTTER,
J. BUTLER STUDLEY,
JACOB J. KAPLAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RECEIVERS, RESPONDENTS.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This is a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit, rendered on December 9, 1915. The facts upon which the claim rests and the course of the litigation are set out briefly in the petition and are as follows:

On May 29, 1912, the predecessor of the petitioner, a corporation of the same name to whose rights the petitioner duly succeeded, both of whom will be hereinafter referred to as the Filene Company, executed a sub-lease of premises of which it was tenant for a term expiring February 27, 1921, to the Wm. S. Butler & Company, Inc., called hereinafter the Butler Company. Rent and occupancy commenced September 3, 1912. The rent payable under this lease was $20,000 per year plus the amounts payable to the overlessors. The lease contained the following clauses:

> "Provided also, and these presents are upon the condition that if the lessee shall neglect or fail to perform and observe any of the covenants, agreements, terms or conditions contained in this instrument . . . or if the lessee shall be declared a bankrupt or insolvent according to law . . . or a receiver appointed of its property, and not discharged within ninety days, then . . . said lessor . . . may . . . enter into and upon said premises . . . and upon entry as aforesaid this lease shall be

determined. . . . And said lessee covenants and agrees, as aforesaid, that in case of such termination or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will pay to the lessor upon demand a sum equal to twenty thousand (20,000) dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one (1) day added (less the five (5) per cent. discount, as aforesaid), and will, at the election of the lessor, which election may be made or changed at any time, either:

(a) Pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same instalments, or if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in each case, however, such sum paid under the preceding clause as represents a part of such instalment, or,

(b) Pay to the lessor, as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however, such sum as has been paid for the same period under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof, or

(c) Indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid during the residue of the term, taking into account any sum paid under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof unexpired.

The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency or receivership proceedings or against any assignee or trustee for the benefit of creditors."

On November 7, 1912, receivers were appointed in the District Court of the United States for the District of Massachusetts for the Butler Company under a bill filed that day alleging embarrassment but not insolvency. The respondents are these receivers. The decree appointing them authorized the conservation of

the assets of the Butler Company, but made no provision for winding it up.

On December 5, 1912, the receivers elected not to affirm the lease from the Filene Company and allowed the rent due thereunder on December 1, 1912, to remain unpaid. By leave of Court the Filene Company entered upon the premises and terminated the lease under its provisions on December 9, 1912. It thereafter relet the premises in the spring of 1913 for a less rental than the rent reserved. It was found in the case that on December 9, 1912, the difference between the rental value of the premises and the rent reserved was $215,530.08. These damages accrued on December 9, 1912, and were then fixed.

On November 11, 1912, the said District Court upon an *ex parte* petition ordered that all creditors of said Wm. S. Butler & Company, Inc., present their claims, made up as of November 7, 1912, to the receivers on or before January 1, 1913, and that all persons whose claims were not so presented should be barred from participating in the distribution of the assets in the hands of the receivers unless the Court should for good cause otherwise order.

The said order was thereafter from time to time modified by extending the time within which claims might be proved until December 15, 1913, when an order was entered by said District Court extending the time for filing proofs of claims as aforesaid *nunc pro tunc* to December 12, 1913.

Your petitioner herein is a claimant, seeking the right, as creditor of the said Wm. S. Butler & Company, Inc., to share in the assets in the hands of said receivers. Said claim was filed for proof on September 30, 1913. Prior thereto, on the seventh day of April, 1913, the said receivers had filed a petition in said District Court for instructions as to the nature and validity of the claim of this petitioner, and on the eighth day of April, 1913, the petitioner filed an answer to said petition of the receivers for instructions asserting a claim similar to that thereafter filed by it as aforesaid.

The Filene Company asked leave to prove for all or so much of the following as might be proper:

> 1. The difference between the rental value of the premises and the rent reserved on December 9, 1912, the day of entry, or in the alternative,
>
> 2. The difference between the amounts accruing from time to time under the lease and the rent reserved to April 1, 1913, plus the difference between the rental value of the premises and the rent reserved on April 1, 1913.

These two amounts were found to be numerically the same.

On December 9, 1912, the date of the entry and termination of the lease, the difference between the rental value of said premises and the rent reserved as found by the Master was (less credits) $215,530.08. Said damages accrued on December 9, 1912, and were then fixed. From December 9, 1912, to December 12, 1913, the last day set for proving claims, the said Wm. Filene's Sons Company actually lost in sums otherwise payable under the terms of the said lease to the said Wm. S. Butler & Company, Inc., the sum of $89,571.28 as found by the Master. Said damages are included in said sum of $215,530.08, and were all determined and fixed prior to the expiration of the time set for proving claims.

The said Wm. Filene's Sons Company sought to prove in the said receivership proceedings, its claims for all or such part of the foregoing as in equity was proper, and asserted the same claim in answer to the petition for instructions filed by the said receivers as aforesaid.

On November 30, 1914, the said District Court entered a decree disallowing the said claim for any sums of money, rent or damages which might have accrued after the seventh day of November, 1912. Thereupon an appeal was taken by said petitioner to the United States Circuit Court of Appeals for the First Circuit and said appeal was heard in said court in April, 1915, and thereupon on or about December 9, 1915, the said United States Circuit Court of Appeals for the First Circuit decided to affirm said decree of the said District Court pursuant to an opinion handed down December 9, 1915, and pursuant to said decision a decree of affirmation was entered on December 9, 1915, and is the decree which your petitioner seeks to have reviewed by this Supreme Court of the United States.

Two of the judges, namely, Judge Bingham and Judge Brown, of the United States Circuit Court of Appeals for the First Circuit, base this decision upon the ground that the claimant was not an existing creditor at the time of the appointment of the receivers; that this claim, if any, arose after the appointment of the receivers and was not of a nature to entitle it to share ratably with the other creditors of the said Wm. S. Butler & Company, Inc.

One of the judges of said Circuit Court of Appeals, namely, Judge Putnam, concurred in the result, but based his decision upon the ground that the case was governed by *Slocum* v. *Soliday*, reported 183 Fed. Rep. 410, a decision by the Circuit Court of Appeals for the First Circuit disallowing the proof of a similar

claim in bankruptcy proceedings under the Bankruptcy Act of 1898.

A first dividend of fifteen per cent. has been declared in the receivership proceedings, so that if the claim of the petitioner is allowed in full it will receive at least thirty thousand dollars.

The petitioner seeks to have the decision of the Circuit Court of Appeals reviewed, and in support of its petition submits that

(1) The case is one fit to be reviewed by this Court, and

(2) The decision of the Circuit Court of Appeals is erroneous.

OUTLINE OF ARGUMENT.

A. THE CASE IS ONE FIT TO BE REVIEWED BY THIS COURT (PAGE 7).

1. THE QUESTION INVOLVED IS ONE OF GENERAL IMPORTANCE (PAGE 7).

2. THE CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS AND THE DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT JUSTIFIES A REVIEW (PAGE 7).

3. THE CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS AND THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE THIRD, FIFTH AND SEVENTH CIRCUITS JUSTIFIES A REVIEW (PAGE 13).

4. THE DECISION IS IN CONFLICT WITH THE DECISION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS IN DEANE *v.* CALDWELL, 127 MASS. 242 (PAGE 14).

5. THE DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN INTERNATIONAL TRUST CO. *v.* WEEKS, 203 U.S. 364, AND CHEMICAL NATIONAL BANK *v.* HARTFORD DEPOSIT CO., 161 U.S. 1, AND THE DECISIONS OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS IN WAY *v.* REED, 6 ALLEN, 364, WOODBURY *v.* SPARRELL PRINT, 187 MASS. 426, EDMANDS *v.* RUST & RICHARDSON DRUG CO., 191 MASS. 123 (PAGE 15).

B. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IS ERRONEOUS (PAGE 15).

1. THE CLAIM IS PROVABLE ALTHOUGH IT WAS CONTINGENT AT THE DATE OF THE APPOINTMENT OF THE RECEIVERS, FOR CLAIMS ARE PROVABLE IN RECEIVERSHIP PROCEEDINGS WHICH ACCRUE PRIOR TO THE DATE FINALLY SET FOR PROVING CLAIMS, ALTHOUGH THEY HAD NOT ACCRUED PRIOR TO THE APPOINTMENT OF THE RECEIVERS (PAGE 16).

2. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN STATING THAT THE RULE FOR PROVABILITY OF CLAIMS IN BANKRUPTCY FURNISHES A PROPER ANALOGY FOR RECEIVERSHIP PROCEEDINGS IN EQUITY, AND IN BASING ITS DECISION THEREON (PAGE 17).

3. THERE IS NOTHING IN THE NATURE OF THE PRESENT CLAIM TO PREVENT ITS PROOF ON A PARITY WITH OTHER CREDITORS (PAGE 18).

4. THE CLAIM IS NOT UPON AN ILLEGAL AGREEMENT, AND THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN BASING ITS DECISION UPON THE CONTENTION THAT THE AGREEMENT WAS AGAINST THE POLICY OF THE BANKRUPTCY LAW (PAGE 19).

ARGUMENT.

A. THE CASE IS ONE FIT TO BE REVIEWED BY THIS COURT.

1. The question involved is one of general importance.

The question involved in the present case is one of the greatest importance.

The foremost questions involved in the case are a determination of the principles which must govern a court of equity in distributing in receivership proceedings the assets of an insolvent corporation among those holding claims against the corporation, a determination whether the court of equity must follow the analogy of bankruptcy, and if the analogy of bankruptcy is followed, what the rules of bankruptcy applicable to a claim like the present may be. The case calls further for a determination of the particular rules of equity — or, if bankruptcy is to be followed — of bankruptcy, applicable to a claim like the present which arises upon the breach of a lease after the appointment of the receivers or the commencement of proceedings in bankruptcy, but before the expiration of the time limited for proof of claims, and before the claim is presented for proof, under covenants by the corporation for the payment of the damages accruing upon the occurrence of such breach.

These questions are of frequent occurrence, and their solutions are of the greatest commercial importance. In the present case the actual damages sustained by the claimant, for which proof is sought, have been found without objection to be over two hundred thousand dollars, the dividend upon which is not less than thirty thousand dollars.

Scarcely a proceeding in bankruptcy, or a receivership in equity occurs without presenting for solution the precise question presented here, viz.: — the provability of the claim of the landlord of the premises occupied by the insolvent tenant.

2. The conflict between the decision of the Circuit Court of Appeals and the decisions of the Circuit Court of Appeals for the Second Circuit justifies a review.

The decision of the Circuit Court of Appeals for the First Circuit is squarely in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in the receivership of the

New York City Railway and of the Metropolitan Street Railway Company. These decisions are reported in 198 Fed. Rep. 721, at 735, 747, 756, 761, 765; 204 Fed. Rep. 513, and 216 Fed. Rep. 458.

These decisions were as follows:

On September 24, 1907, receivers were appointed in the Circuit Court of the United States for the New York City Railway (called the City Company) and on October 1, 1907, the same receivers became receivers of the Metropolitan Street Railway Company (called the Metropolitan Company). The Metropolitan Company was then under lease to the City Company for a term having 994 years to run, the rent being the assumption of the obligations of the Metropolitan Company, except the principal of its funded debt, and the payment of a further annual rental equal to 7 per cent upon its preferred stock. This lease was surrendered by the receivers on August 1, 1908.

The Circuit Court limited the time for the presentation of claims against the City estate to December 10, 1907, and against the Metropolitan estate to January 15, 1908 (198 Fed. Rep., at 757).

Various questions arose in the litigation as to the provability of claims in the receivership proceedings. The decisions and the principles enumerated in rendering them are squarely in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the present case, that (1) the claim of the Filene Company for matters accruing after November 7, 1912, was not provable; (2) the analogy of bankruptcy should be followed; (3) claims under existing contracts which were contingent as to existence and amount at the date of the appointment of the receivers should not be admitted to proof, although fixed and determined when offered for proof.

The Circuit Court of Appeals for the Second Circuit holds upon these points the following:

"*Express Company's Appeal*," reported 198 Fed. Rep. 735:

Prior to the lease of its system by the Metropolitan Company to the City Company, the Metropolitan Company had made a contract with the Metropolitan Express Company for an express privilege over its lines for twenty years. This lease was assumed by the City Company.

In 1904 the Metropolitan Express Company assigned the contract to the American Express Company for a stipulated rental.

On February 28, 1908, the receivers of the railways elected not to affirm these contracts, and thereupon the Metropolitan

Express Company preferred this claim for damages for the termination of the express privilege. It was held that the claim was provable, the Court saying:

> "Debts and liabilities, present and future, certain and contingent, stand upon the same equitable basis (page 738). . . .
>
> A court of equity . . . in prescribing what claims shall take in the distribution of the estate of a corporation must regard, on the one hand, the substantial right of all creditors to share in their debtor's property, and, on the other, the necessity for expeditious administration and, giving due consideration tc both, must make rules which are practicable as well as equitable. . . .
>
> If we should attempt to formulate equitable rules from bankruptcy statutes we should probably follow none of them. The early acts and the English statutes indicate a procedure of uncertainties inconsistent with the expeditious settlement of estates. On the other hand, the present bankruptcy law, which deals with individuals as well as corporations and has regard to the right of discharge, can hardly be regarded as a guide in a purely equitable matter affecting corporations alone.
>
> The real inquiry in getting at a basis for the distribution of an insolvent estate is whether the claims are reduced to dollars and cents. If they are so reduced or can be so reduced by the application of recognized principles they are entitled to share. If they are not they cannot share. And this not at all for any reason affecting their merits nor strictly speaking because they are contingent, but because they are uncertain. . . .
>
> One more question remains for consideration in formulating any general equitable rule. A time should be stated with respect to which the status of claims should be fixed. The briefs upon these appeals indicate a general impression among counsel that the date of the appointment of the receivers is the time which controls. Apparently this view is based upon the earlier theory of the courts that a creditors' bill is an equitable levy equivalent to a general execution in favor of creditors who at the time it is filed are in a position to obtain execution or attachment. But, as we have seen, the right to share in corporate assets is, at the present time, not confined to creditors who might themselves have instituted separate proceedings, nor are the

assets to be shared in those alone which could be seized upon execution. The present extension of equitable jurisdiction over corporations would be wholly unjustifiable if it were for the benefit of a particular class of creditors. Consequently the time of the appointment of the receiver constitutes no logical or necessary date for determining the provability of demands and it should be fixed as equity, with due regard to convenience, may require.

The commencement of the receivership should properly determine the existence of the corporate engagement. The estate should not be liable upon contracts or agreements entered into by the corporation after the appointment of the receiver. But when the engagement exists, we perceive no equitable reason why that time should determine the provability of demands based upon it. Indeed the equitable considerations are rather the other way. There are cases in which the very fact of the appointment of the receiver breaks the obligation and creates the demand. In such cases it is manifestly inequitable that any technical objection should operate to prevent the proof of the claim. So, in many cases, uncertainties regarding claims may be removed soon after the appointment of the receiver and before anything is done towards making up accounts or distributing assets. Claims of this nature should share in the estate. And the effort of a court of equity should be to have them share. It is not a light thing for a chancery court, acting without statutory direction, to say that a creditor shall lose his demand when he has not been at fault and when the settlement of the estate will not be protracted by allowing it. We find much to approve in the report of the special master (confirmed by the Circuit Court) in *New York Security & Trust Co.* v. *Lombard Inv. Co.*, 73 Fed. 537. . . .

Under the foregoing decision creditors were permitted to prove claims which, although not matured and certain at the time of the appointment of the receivers, became such before any order of distribution. We think this rule very nearly correct, although it probably goes too far in permitting the proof of claims up to the time of distribution. All claims ought to be in before the accounts are made up for distribution, and there should be no opportunity for uncertainty, delay or expense in reopening and recasting them. A narrower rule can be adopted which would obviate any difficulty in this regard and which would be simple, equitable and workable. It is this: Claims which

when presented within the time limited by the Court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period."

"*Second Avenue Bondholders' Appeal*" (198 Fed. Rep. 747):

The Metropolitan Company became lessee of the Second Avenue Railroad Company, and as rental guaranteed the interest and principal upon the bonds of the Second Avenue Company, and also agreed to pay 8 per cent upon its capital stock.

The time limited for the proof of the claims of the bondholders was fixed as March 1, 1910. The Circuit Court of Appeals held that the bondholders could prove in the receivership of the Metropolitan Company for all interest coupons which fell due up to March 1, 1910 (198 Fed. Rep. 753).

Under the rule of this case, the petitioner herein should have been permitted to prove for all instalments of rent which accrued between November 7, 1912, and December 12, 1913, amounting to a net claim of $89,571.28.

"*Crosstown Company's Appeal*" (198 Fed. Rep. 756):

In 1904 the Central Crosstown Railroad Company leased its property to the Metropolitan Company for 999 years from April 1, 1904, for the yearly rental of 15 per cent, upon its capital stock, the agreement to pay all taxes upon its property, and the assumption of the interest upon its funded debt.

The Crosstown Company lease was disaffirmed May 1, 1908.

The Crosstown Company presented certain claims for:

(a) Accrued dividend rentals under the lease.
(b) Future damages for breach of the lease.
(c) Payments for special franchise taxes.

It was held by the Circuit Court of Appeals for the Second Circuit that

(a) Dividend rentals which accrued October 1, 1907, — after the date of the appointment of the receivers, — were provable.

(b) Franchise taxes falling due before December 10, 1907, were held provable.

(c) No damages were allowed for future rentals because they were too uncertain at the time limited for the proof of claims, the lease not having been "terminated, — as distinguished from being defaulted upon, — prior to the time which fixed the status of the claims" (198 Fed. Rep. at 760).

It is obvious from this decision that if the lease had been terminated prior to December 10, 1907 (the date set for proving claims), and the damages then fixed, the Court would have permitted the proof of the claim. It expressly permitted the proof of claims for rent which accrued after the date of the commencement of receivership proceedings, and future rent has long been deemed the typical "contingent" claim.

Attention is called by the District Court of Massachusetts in its opinion in the Filene case, which was adopted by the Circuit Court of Appeals for the First Circuit, to the statement by the Circuit Court of Appeals for the Second Circuit in discussing the "Express Company's Appeal" that that case is to be distinguished from a case relating to leases of real estate (198 Fed. Rep. 744, note).

The Court was there speaking, however, of the effect of receivership or bankruptcy in terminating a contract, as distinguished from terminating a lease. This is clearly established by the "Crosstown Company's Appeal."

"*Metropolitan Stockholders' Appeal*" (198 Fed. Rep. 761):

In this decision the Circuit Court of Appeals for the Second Circuit held that stockholders of the Metropolitan Company could prove againt the City estate for dividends upon their stock guaranteed by the City Company, as part of the rental of the Metropolitan Company, which rentals had accrued after the appointment of the receivers, but before the expiration of the date limited for the proof of claims. The Court disallowed a claim for future rentals because there was no provision for the payment of any further sums upon the termination of the lease.

"*Validity of Lease Proceedings*" (198 Fed. Rep. 765):

In this decision a claim upon a guaranty of the payment of taxes which accrued after the commencement of the receivership was admitted to proof.

It is submitted that as stated above the decision of the Circuit Court of Appeals for the First Circut is opposed to the foregoing decisions:

(1) In disallowing the claim of the Filene Company for mat-

ters which accrued after the date of the commencement of the receivership proceedings. The Circuit Court of Appeals for the Second Circuit expressly allowed claims for rent and upon guarantees of rent accruing after the commencement of the receivership, and adopted, as proper, principles which would admit the present claim to proof in full.

(2) In adopting as a guiding principle the analogy of the rules applicable to the proof of claims under the Bankruptcy Act of 1898. The Circuit Court of Appeals for the Second Circuit expressly repudiates this.

(3) In holding that in equity a claim which accrues, and becomes fixed and determined before the date limited for the proof of claim is not provable because contingent as to existence and amount at the date of the appointment of the receivers. The Circuit Court of Appeals for the Second Circuit holds that this is not a valid test.

3. THE CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS AND THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE THIRD, FIFTH AND SEVENTH CIRCUITS JUSTIFIES A REVIEW.

The Circuit Court of Appeals for the First Circuit held that the provability of this claim must be determined by the principles which prevailed in bankruptcy.

The majority of the Court say: "As rent was paid up to the filing of the creditors' bill, the creditors were entitled to assert that no breach occurred by act of the lessee before they asserted their right to the assets. For a breach after this time the lessor must look to the personal responsibility of the lessee at the time of the breach. The reason for the rule is the same in bankruptcy and in equity" (Record, p. 95). . . . "The claim was rightly disallowed because the appellant did not become legally or equitably a creditor before other creditors had become entitled both under the bankruptcy act and upon equitable principles to all the assets for pro rata distribution . . . " (Record, p. 95).

The third judge, Judge Putnam, puts his decision squarely upon what he conceives to be the rule prevailing in bankruptcy in a similar case (*Slocum* v. *Soliday*, 183 Fed. Rep. 410, 412), decided by the Circuit Court of Appeals for the First Circuit (Record, p. 97).

If the analogy of bankruptcy is to be followed, there is a sharp conflict between the Circuit Court of Appeals for the First Circuit and the Circuit Courts of Appeals for the Third, Fifth and

Seventh Circuits as to the rule applicable in bankruptcy in a case like the present.

In *Martin* v. *Orgain*, 174 Fed. Rep. 772, the Circuit Court of Appeals for the Fifth Circuit, Judge Pardee speaking for the Court, stated that in its opinion the claim of a lessor upon a lease was provable in bankruptcy if fixed before the claim was presented for proof, although contingent at the date of the petition in the same manner as the claim of an indorser upon commercial paper.

In *Ludlow* v. *Pugh*, 213 Fed. 450, the Circuit Court of Appeals for the Third Circuit held a claim substantially like the present provable in bankruptcy although the termination of the lease occurred after the petition.

In *re Desnoyers Shoe Co.*, 227 Fed. Rep. 401, the Circuit Court of Appeals for the Seventh Circuit held that where the United Shoe Machinery Company leased certain machinery to the Desnoyers Shoe Company, the lease containing the following provision: "If the lessee becomes insolvent or bankrupt . . . then . . . any or all leases of or licenses to use machinery then existing between the lessor or the lessee . . . shall, at the option of the lessor, cease and determine," and the lessee became bankrupt, and five days afterwards the lessor gave notice that it had elected to terminate the leases, a claim for damages arising upon such termination was provable.

The necessity for a review in the present case is intensified by the fact that in *re Roth & Appel*, 181 Fed. Rep. 667, the Circuit Court of Appeals for the Second Circuit applied in bankruptcy to a case like the present the same rule as the Circuit Court of Appeals for the First Circuit; and in *re Jorolemon-Oliver Co.*, 213 Fed. 625, the same Court rendered a decision squarely in conflict with the decision in *re Desnoyers Shoe Co.*, just cited.

4. THE DECISION IS IN CONFLICT WITH THE DECISION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS IN DEANE *v.* CALDWELL, 127 MASS. 242.

In *Deane* v. *Caldwell*, 127 Mass. 242, 246, a lessee died and his estate was represented insolvent. It was held that the lessor might prove a claim for all rent which accrued up to the time of presenting the claim under an insolvency statute which prescribed no date as of which the provability of claims was to be determined.

5. THE DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN INTERNATIONAL TRUST CO. *v.* WEEKS, 203 U.S. 364, AND CHEMICAL NATIONAL BANK *v.* HARTFORD DEPOSIT CO., 161 U.S. 1, AND THE DECISIONS OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS IN WAY *v.* REED, 6 ALLEN, 364, WOODBURY *v.* SPARRELL PRINT, 187 MASS. 426, EDMANDS *v.* RUST & RICHARDSON DRUG CO., 191 MASS. 123.

The District Court in its opinion which was adopted by the Circuit Court of Appeals, held that the claim of the lessor of the kind presented herein was inequitable, unconscionable, and against public policy, and therefore to be postponed to other creditors in proceedings like these (Record, pp. 81, 93, 96).

It is obvious that if this argument is sound the claim of a lessor upon a covenant by the lessee of indemnity or compensation in the event of a termination should be equally not provable because of the unconscionable nature of the claim whether the termination occurred before, after, or simultaneously with the receivership or bankruptcy.

This Court and the Supreme Judicial Court of the Commonwealth of Massachusetts have nevertheless held such a claim provable and enforceable, even against a receiver in equity where the claim arose before the receivership proceedings.

International Trust Co. v. *Weeks*, 203 U.S. 364.
Chemical National Bank v. *Hartford Deposit Co.*, 161 U.S. 1.
Way v. *Reed*, 6 Allen, 364.
Woodbury v. *Sparrell Print*, 187 Mass. 426.
Edmands v. *Rust & Richardson Drug Co.*, 191 Mass. 123.

B. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IS ERRONEOUS.

The Circuit Court of Appeals bases its decision principally upon the argument that it is inequitable to permit the Filene Company to prove its claim since other creditors had a right to rely upon the fact that the claim if it arose after bankruptcy would not be entitled to proof; that other creditors "were entitled to give credit to the lessee regardless of the mere possibility of a future debt, and if credit was given in ordinary course until their debts

exceeded the assets, that this fact gave rise to an equitable right to distribution among them of the assets upon which they relied for payment, for the enforcement of which they might resort to the bankruptcy court, or to a court of equity;" that "this right after it is once asserted by petition or bill cannot be impaired or diminished by a debt which did not come into being until the assets were insufficient to pay those creditors who had contracted with the lessee upon the assumption of solvency" (Record, p. 95).

This is an argument that the claim is not provable because other creditors had a right to assume it could not be proved in receivership proceedings. This is obviously an argument in a circle and fallacious as such. But the error in the decision is more fundamental. It lies in the assertion of the basic proposition that this claim is from its nature not provable in equity receivership proceedings, both because of the nature of the claim, and because of the rule thought to apply in bankruptcy.

It is respectfully submitted that the Circuit Court of Appeals was in error in asserting these propositions, and in basing its decision upon them for the following reasons:

1. THE CLAIM IS PROVABLE ALTHOUGH IT WAS CONTINGENT AT THE DATE OF THE APPOINTMENT OF THE RECEIVERS, FOR CLAIMS ARE PROVABLE IN RECEIVERSHIP PROCEEDINGS WHICH ACCRUE PRIOR TO THE DATE FINALLY SET FOR PROVING CLAIMS, ALTHOUGH THEY HAD NOT ACCRUED PRIOR TO THE APPOINTMENT OF THE RECEIVERS.

It is established by a number of authorities both in the Federal and in the State Courts, that in equity, where the prescribed rules of bankruptcy have no force as such, the court in the effort to achieve the fair result will permit those claimants to share in the distribution of the funds of the insolvent whose rights accrue while the fund is in the control of the court, up to the time limited for proving claims, without regard to the existence or non-existence of the claim as such at the date of the commencement of the proceedings.

The leading case in the Federal Courts is now the case in the Second Circuit cited above (*Pennsylvania Steel Co.* v. *New York City Ry.*, 198 Fed. Rep. 721, 738, 740, 741), which clearly establishes the propositions stated.

To the same effect is *New York Security & Trust Co.* v. *Lombard Investment Co. of Kansas*, 73 Fed. Rep. 537, 546, 547 (C.C.W.D. Mo., 1896).

Outside of the Federal Courts, the question of the prova-

bility in receivership or analogous proceedings of claims which did not accrue until after the date of proceedings has been considered by a number of State Courts, and their decisions have been in accord with the rule laid down in *Pennsylvania Steel Co.* v. *New York City Ry. Co.* In a number of instances the claims were by lessors upon facts almost identical with those in the case at bar.

Woodland v. *Wise*, 112 Md. 35 (1910). Landlord's claim for breach of lease.

People v. *St. Nicholas Bank*, 151 N.Y. 592 (1897). Landlord's claim for breach of lease.

Kalkhoff v. *Nelson*, 60 Minn. 284 (1895). Landlord's claim for breach of lease.

Minn. Baseball Co. v. *City Bank*, 74 Minn. 98 (1898).

Spade v. *Mural Decoration Mfg. Co.*, 47 N.J. Eq. 18 (1890).

Bolles v. *Crescent Drug & Chemical Co.*, 53 N.J. Eq. 614 (1895).

Reading Iron Works, 150 Pa. 369.

McGraw v. *Union Trust Co.*, 135 Mich. 609 (1904). Landlord's claim for breach of lease.

Hoyle v. *Scudder*, 32 Mo. App. 372 (1888). Landlord's claim for breach of lease.

Reynolds v. *Fuller*, 64 Ill. App. 134 (1896).

Chicago Fireplace Co. v. *Tait*, 58 Ill. App. 293 (1895).

Smith v. *Goodman*, 149 Ill. 75 (1893). Landlord's claim for breach of lease.

Wilder v. *McDonald*, 63 Oh. 383 (1900). Landlord's claim for breach of lease.

2. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN STATING THAT THE RULE FOR THE PROVABILITY OF CLAIMS IN BANKRUPTCY FURNISHES A PROPER ANALOGY FOR RECEIVERSHIP PROCEEDINGS IN EQUITY, AND IN BASING ITS DECISION THEREON.

(a.) Equity does not follow the analogy of bankruptcy in other matters relating to the distribution of insolvent estates.

Merrill v. *National Bank of Jacksonville*, 173 U.S. 131, 146 (1898). Proof of secured claims.

Re Seaboard Air Line Ry., 166 Fed. Rep. 376. Proof of tort claims.

U.S. Rubber Co. v. *American Oak Leather Co.*, 181 U.S. 434 (1901). Preferences.

Union Trust Co. v. *Souther*, 107 U.S. 591 (1882). Priorities.

(b.) The jurisdiction of equity rests on a basis fundamentally different from that of bankruptcy.

1. There is no change in the title to the assets in equity.

Quincy Railroad v. *Humphreys*, 145 U.S. 82, 97, 98 (1891).

2. There is no discharge in equity.

(c.) There is no definite analogy in bankruptcy to be followed.

If bankruptcy is to furnish an analogy, it is a question what bankruptcy act shall be followed.

Penn. Steel Co. v. *New York City Ry.*, 198 Fed. Rep. 721, 739.

(d.) If the analogy of bankruptcy is to be followed, the rules prevailing when there was no right of discharge in bankruptcy should be followed.

Historically, when there was no right to discharge in bankruptcy, creditors were allowed to prove whose claims though contingent at the commencement of the proceedings were fixed when presented for proof.

Holland v. *Calliford*, 2 Vernon, 661.
Ex parte Caswell, 2 P.W. 497.
Ex parte Greenaway, 1 Atk. 113.
Ex parte Groome, 1 Atk. 115.

3. THERE IS NOTHING IN THE NATURE OF THE PRESENT CLAIM TO PREVENT ITS PROOF ON A PARITY WITH OTHER CREDITORS.

It is not a claim for "accelerated" future rent nor for a penalty, but a claim for compensatory damages for injuries actually suffered.

Ex parte Llynvi Coal & Iron Co. in Re Hide, L.R. 7 Ch. Ap. 28.

The equitable character of the claim is recognized by the Supreme Courts of Maryland, New York, Minnesota, Michigan, Illinois, Ohio, and Pennsylvania.

Woodland v. *Wise*, 112 Md. 35.
People v. *St. Nicholas Bank*, 151 N.Y. 592.
Kalkhoff v. *Nelson*, 60 Minn. 284.
McGraw v. *Union Trust Co.*, 135 Mich. 609.
Smith v. *Goodman*, 149 Ill. 75.
Wilder v. *McDonald*, 63 Oh. St. 383.
Reading Iron Works, 150 Pa. 369.

4. THE CLAIM IS NOT UPON AN ILLEGAL AGREEMENT, AND THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN BASING ITS DECISION UPON THE CONTENTION THAT THE AGREEMENT WAS AGAINST THE POLICY OF THE BANKRUPTCY LAW.

The provision of the lease that "the amounts due the lessor from the lessee under the preceding clause may be proven in bankruptcy, insolvency or receivership proceedings or against any assignee or trustee for the benefit of creditors" was clearly not inserted with any idea of causing the claim by such an agreement to be provable if upon a correct application of legal and equitable principles the claim was not otherwise of a provable nature.

The reason for the insertion of this clause lies in another direction, viz.: to guard against the argument sometimes made that the events which have occurred were the acts of the law for which no compensation could be made.

Clearly if the claim is otherwise provable, the insertion of this clause cannot prevent it from proof.

The Circuit Court of Appeals for the First Circuit seems to assume that the Filene Company is seeking to establish a claim under an agreement by the lessee that the lessee will not become bankrupt. It is obvious that this is not so. The lessor is seeking only compensation for the actual loss caused by a breach of the lease. The clause in question covers solvency as well as insolvency. It is true that the breach of the lease in the present instance is indirectly caused by the lessee's insolvency, but it has never been urged that a claim for damages for breach of contract was illegal or unconscionable merely because the breach was caused by the lessee's insolvency. The Circuit Court of Appeals for the First Circuit has recognized this in prior decisions.

In *re Swift*, 112 Fed. Rep. 315.
See *Pennsylvania Steel Co.* v. *New York City Ry.*, 198 Fed. 721, 735 (C.C.A. 2d).
In *re Neff*, 157 Fed. 57 (C.C.A. 6th).

It is accordingly respectfully submitted that the Circuit Court of Appeals for the First Circuit was in error in basing its decision upon the argument that "in substance the covenant is one of indemnity or insurance, — a covenant to indemnify the lessor against loss occasioned by the lessee's bankruptcy or insolvency."

The argument that the claim is improper because the lessor had in mind the proof of a claim in proceedings in bankruptcy or

insolvency is without merit, for in this respect the claim does not differ from any ordinary claim. The claim is not founded upon an agreement that property which was the debtor's prior to the insolvency shall become the property of some one else upon insolvency; nor is it an agreement that a debt shall become due by reason of or because of bankruptcy, nor is the debt one which has no relation to the actual injury caused.

No point can be made of the fact that the District Court originally ordered that claims be presented to the receivers made up as of November 7, 1912. This was an interlocutory *ex parte* order, obviously not made with the intent of adjudicating what claims were provable at that time and reviewable on appeal. The Court expressly reserved the right to admit any claim for good cause shown. Furthermore, the opinion of the District Judge, adopted by the Circuit Court of Appeals expressly states, "this claim is being dealt with not only as presented under the order of November 11, 1912, but also as presented by the receivers' petition for instructions and the claimant's answer thereto. There can be no final order of distribution for some time to come. Although both as to existence and amount the claim was too contingent on November 7, 1912, for allowance as of that date, I must consider it allowable in these proceedings now, if it has since that date become allowable" (Record, p. 77).

CONCLUSION.

It is accordingly submitted that in view of the conflict between the decision of the Circuit Court of Appeals for the First Circuit and the decisions of this Court, of the Circuit Courts of Appeals for other circuits, and of the Supreme Judicial Court for the Commonwealth of Massachusetts, in view of the importance of the questions involved, and in view of the fact that the decision of the Circuit Court of Appeals for the First Circuit is erroneous, the petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1915.

No. 393

WILLIAM FILENE'S SONS COMPANY,

PETITIONER,

v.

CHARLES F. WEED ET AL.,

RESPONDENTS.

Brief in Opposition to Petition for Writ of Certiorari.

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Supreme Court of the United States.

October Term, 1915.

No. 827.

WILLIAM FILENE'S SONS COMPANY,
PETITIONER,

v.

CHARLES F. WEED ET AL., RESPONDENTS.

Brief in Opposition to Petition for Writ of Certiorari.

The question is whether, in an equity receivership of an insolvent corporation, a lessor's claim for future rent, or for damages suffered through termination of the lease, or for liquidated damages or penalty stipulated in the lease, is entitled to rank with the claims of those who were creditors at the date of the decree appointing receivers and at the date of the decree ordering creditors to prove their claims.

The decree appointing receivers, upon a creditors' bill praying equitable distribution of the assets, was made November 7, 1912. The decree ordering creditors to prove their claims, made up as of November 7, 1912, was entered November 11, 1912.

There was no breach of the lease until December, 1912. On December 5 the receivers elected not to

assume the lease, and on December 9 the lessor entered and terminated the lease.

The lessor's claim had no existence at the date of insolvency. The question how to deal with claims which existed at that date, but could not be liquidated until a later time, yet within the time limited for proof of claims, is not involved.

A lease, as all the decisions recognize, differs from an executory contract. Suffering the appointment of receivers is a breach of such a contract, and, if the damages are ascertainable within a reasonable time limited for the proof of claims, they may be proved. The right to damages exists at the date of insolvency. Under a lease, on the other hand, no right to damages comes into existence until and unless the lessor enters and terminates the lease. Not only is the amount of the claim contingent, but the existence of the claim is contingent, upon action by the lessor after the insolvency.

Weeks v. *International Trust Co.*, 125 Fed. 370 (C.C.A. 1st), affirmed by —
International Trust Co. v. *Weeks*, 203 U.S. 364.

Whenever this question has arisen in the Circuit Courts of Appeals it has been decided in accord with the decision of the First Circuit in the present case.

Penn. Steel Co. v. *N.Y. City Ry. Co.*, 198 Fed. 721, 744 (C.C.A. 2d). Decision allowing claim for breach of executory contract distinguishes lease cases in dictum.
Crosstown Co's. Appeal, 198 Fed. 756, 760 (C.C.A. 2d).

The same question arising under the Bankrupt Act of 1898 has uniformly been decided against the lessor.

Slocum v. *Soliday*, 183 Fed. 410 (C.C.A. 1st).
In re Roth v. *Appel*, 181 Fed. 410 (C.C.A. 2d).
Colman Co. v. *Withoft*, 195 Fed. 250 (C.C.A. 9th).

Upon this point there is no conflict among the circuits.

In *Ludlow* v. *Pugh*, 213 Fed. 450 (C.C.A. 3d), affirming *Re Keith-Gara Company*, 203 Fed. 585, cited by the petitioner, an instalment of rent payable in advance became due and was unpaid *before the bankruptcy.* The lessor claimed the future rent for the rest of the term, which was less than a year, under the Pennsylvania statute giving a landlord priority for one year's rent. The Court held that, since the local statute was recognized by the Bankrupt Act, the claim was provable under section 63*a* (4).

Martin v. *Orgain*, 174 Fed. 772 (C.C.A. 5th), is a decision under a similar local statute. The rent was due in advance March 1. The adjudication in bankruptcy was March 9. The date of the petition does not appear, but the opinion contains nothing in conflict with the decisions in the First, Second, and Ninth Circuits.

In re Desnoyers Shoe Co., 227 Fed. 407, instead of conflicting with these decisions, cites them with approval.

Indeed, it is the spirit and purpose of the Bankrupt Act of 1898, although the language of section 63 is

ambiguous, that only such debts are provable as existed at the time of filing the petition.

Zavelo v. *Reeves*, 227 U.S. 625, 631.

Even under the Bankrupt Acts of 1841 and 1867, which expressly provided for proof of contingent and uncertain claims, a claim of this character, whose very existence was subject to a contingency, was not provable.

PUTNAM, J., in *Slocum* v. *Soliday*, 183 Fed. 410, 412.

GRAY, C.J., in *Deane* v. *Caldwell*, 127 Mass. 242, 244.

Logically, the same rule should apply in an equity receivership.

There is nothing to the contrary in —

Chemical National Bank v. *Hartford Deposit Co.*, 161 U.S. 1, affirming 156 Ill. 522, 528.

There the lessor's entry for breach was on May 1. The bank became insolvent on May 9. The receiver was appointed on July 21, and on July 27 he elected not to adopt the lease.

The state Court assumed that, if there had been no breach before insolvency, the lessor would have no provable claim. The question here presented was not considered either in the state Court or in the Supreme Court.

161 U.S. 1, at pages 9, 10.

The same rule is applied in common-law assignments for the benefit of creditors:

(*a*) Where the assignment provides for settlement under bankruptcy rules.

Cotting v. *Hooper-Lewis Co.*, 220 Mass. 273.

(*b*) Where the assignment provides for settlement under insolvency rules.

Shaw v. *United Shoe Machinery Co.*, 220 Mass. 486.

(*c*) Where the assignment leaves open the rules which shall be applicable.

Matter of Hevenor, 144 N.Y. 271.

The rule is essentially a rule of equity, whether applied in bankruptcy, insolvency, or receivership — seeking equal distribution as of the date when the insolvent corporation loses the right to manage its own affairs. It is inequitable to allow this claim, because it depends upon the action of the lessor after insolvency whether there shall be a claim or not, and, to some extent, the amount of it. The lessor made himself a creditor by his own act after the creditors had become entitled, both under the Bankrupt Act and upon equitable principles, to all the company's assets for pro-rata distribution.

In England since 1869, and in Massachusetts since 1879, the matter has been regulated by statute.

St. 32 and 33 Vict. c. 62, secs. 23, 37.
Deane v. *Caldwell*, 127 Mass. 242.
Abbott v. *Stearns*, 139 Mass. 168.
See *Bowditch* v. *Raymond*, 146 Mass. 109.

Except as the rule is qualified by statute, there is no conflict between the decisions of Massachusetts, of the

First Circuit, and of any other circuit. Therefore, although the question is one of importance and general interest, and has not been decided by this Court, we respectfully submit that the law is well settled by the decision and opinions of the Courts of the First Circuit.

CHARLES F. CHOATE, JR.,
FREDERICK H. NASH,
Of Counsel for the Respondents.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 93

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RECEIVERS,
RESPONDENTS.

BRIEF ON BEHALF OF WM. FILENE'S SONS COMPANY.

GEORGE R. NUTTER,
JACOB J. KAPLAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

WM. FILENE'S SONS COMPANY, PETITIONER,

v.

CHARLES F. WEED AND OTHERS, RECEIVERS, RESPONDENTS.

BRIEF ON BEHALF OF WM. FILENE'S SONS COMPANY.

STATEMENT OF THE CASE.

This case comes before this Court upon a writ of certiorari granted in February, 1916, to review a decision of the Circuit Court of Appeals for the first circuit rendered December 9, 1915. The question presented is that of the provability in equity receivership proceedings of claims arising under an agreement dealing with a lease of real estate, upon a breach and consequent termination of the occupancy which occurred after the appointment of the receivers, and particularly under a covenant for the payment of damages upon such breach.

STATEMENT OF FACTS.

The petitioner herein is a Massachusetts corporation known as the Wm. Filene's Sons Company. On May 29, 1912, the predecessor of the petitioner, a corporation of the same name to whose rights the petitioner succeeded (both of which corporations are hereinafter referred to as the "Filene Company"), was the tenant of five adjoining buildings in the center of the retail shopping district of the City of Boston, under leases from five different landlords at

varying rentals and which expired at different dates between 1918 and 1921 (Record, pages 60, 61). The last of the leases was to expire on February 28, 1921 (Record, page 46). These buildings had been joined together by the Filene Company and were used by it as a single department store building and were fitted and furnished by it for such use.

Having acquired a new site and a new building, the Filene Company placed the premises in question upon the market for letting and on May 29, 1912, executed an agreement which provided among other things for a sub-lease of the premises to Wm. S. Butler & Co., Inc., a corporation engaged in a business similar to that of the Filene Company in the City of Boston (Record, pages 29, 61). The question herein presented arises upon the proof of claim by the Filene Company for damages which it suffered upon the breach and termination of this agreement after the appointment in equity of receivers for the Butler Company.

Execution of Lease.

Under the terms of the agreement, the Butler Company was granted the possession of the premises fully fitted and furnished for a term commencing September 3, 1912, and expiring at different times upon the different parcels, the last date of expiration being February 27, 1921 (Record, pages 29, 61). The fittings and furnishings were to be the property of the Butler Company at the end of the term (Record, page 31). The Butler Company was to pay as consideration twenty thousand dollars per year in addition to the amounts payable to the over-lessors of the Filene Company (Record, page 29).

This payment of twenty thousand dollars per year had been agreed upon in place of a lump sum bonus originally asked by the Filene Company for the making of this sub-lease (Record, page 69).

This bonus payment of twenty thousand dollars per year was by the terms of the agreement to continue to the last date of expiration of any portion of the premises, *i.e.*, February 27, 1921, and by the terms of the agreement was to be paid regardless of the termination of the over-lease of any portion of the premises, and was also to continue in the event of a termination of the agreement by the Filene Company by reason of default on the part of the Butler Company (Record, page 29).

The agreement of lease also contained the following provision (Record, page 37):

> "Provided also, and these presents are upon the condition that if the lessee shall neglect or fail to perform and

observe any of the covenants, agreements, terms or conditions contained in this instrument . . . or if the lessee shall be declared a bankrupt or insolvent according to law . . . or a receiver appointed of its property, and not discharged within ninety days, then . . . said lessor . . . may . . . enter into and upon said premises . . . and upon entry as aforesaid this lease shall be determined. . . . And said lessee covenants and agrees, as aforesaid, that in case of such termination or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will pay to the lessor upon demand a sum equal to twenty thousand (20,000) dollars per year, and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one (1) day added (less the five (5) per cent. discount, as aforesaid), and will, at the election of the lessor, which election may be made or changed at any time, either:

Clause for Payment of Damages on Termination.

(a) Pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same instalments, or if the premises shall have been relet, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in each case, however, such sum paid under the preceding clause as represents a part of such instalment, or

(b) Pay to the lessor, as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however, such sum as has been paid for the same period under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof, or

(c) Indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid during the residue of the term, taking into account any sum paid under the above clause requiring a payment of twenty thousand (20,000) dollars for each year or fractional part thereof unexpired.

The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency,

or receivership proceedings or against any assignee or trustee for the benefit of creditors."

As has hereinbefore been stated the Butler Company entered into possession of the premises on September 3, 1912, and continued to occupy them until the seventh day of the following November when receivers were appointed in the District Court of the United States for the District of Massachusetts for the Butler Company under a bill filed that day alleging embarrassment, but not insolvency (Record, page 61). The decree appointing these receivers authorized the conservation of the assets of the Butler Company, but made no provision for winding up the company (Record, page 6).

Appointment of Receivers.

On December 5, 1912, these receivers elected not to affirm the lease from the Filene Company and allowed the rent due thereunder on the first day of December to remain unpaid (Record, pages 61, 62). By leave of Court, the Filene Company, on December 9, 1912, entered upon the premises and terminated the occupancy of the Butler Company under the provisions hereinbefore recited (Record, pages 11, 62). After the election of the receivers not to affirm the lease and the entry of the Filene Company, the receivers continued to occupy the premises until January 1, 1913, when they vacated. Immediately upon the election of the receivers not to affirm the lease the Filene Company made all reasonable and proper efforts to obtain tenants for the premises as a whole or in part, and finally disposed of the premises in a manner found by the Master to have been reasonable and proper, by reletting the premises in the spring of 1913 for the remainder of the term of the over-leases at a less rental than the amount of the rent reserved (Record, page 66).

Termination of Lease.

It was found in the case by the Master that on December 9, 1912, the difference between the rental value of the premises and the rent reserved for the remainder of the term was $215,530.08. These damages accrued on December 9, 1912, and were then fixed (Record, page 65). Upon this there appears to have been no question. The Master also found that the damages suffered by the Filene Company were the same, whether they were taken to be the difference between the rental value of the premises on the date of entry, December 9, 1912, and the rent reserved, or the actual loss suffered by the Filene Company in the disposal of the premises finally made by it in the spring of 1913 (Record, pages 66, 67).

Damages.

It was also found to be immaterial in making this calculation

whether the payment of twenty thousand dollars per year was taken as an absolute payment in gross or as part of the rent, for it was found that the damages suffered by the Filene Company were in excess of this item of twenty thousand dollars per year (Record, pages 67, 68).

On November 11, 1912, four days after the filing of the bill for and the appointment of the receivers, the District Court, upon an *ex parte* petition, entered an order directing that all creditors of the Butler Company present their claims "made up as of November 7, 1912, verified by affidavit, to the receivers at their office at 451 Washington Street, in the City of Boston, on or before January 1, 1913, and that all persons or corporations whose claims are not presented in the manner and in the time herein specified shall be barred from participating in the distribution of the assets in the hands of the receivers under direction of this Court, unless the Court for good cause shall otherwise order" (Record, page 7).

Orders as to Proof of Claims.

This order was from time to time modified by extending the time within which claims might be proved until December 15, 1913, when an order was entered by the District Court extending the time for filing proofs of claims in the following language (Record, page 59):

> "This cause came on to be heard on December 13, 1913, upon the receivers' suggestion for a final decree relative to allowance and disallowance of claims, and it appearing that all claims have been considered by the receivers if filed on or before December 12, it is hereby ordered that the time for filing proofs of claim is hereby extended *nunc pro tunc* from October 1 until December 12, 1913, and that all creditors whose claims have not been presented prior to said date shall be forever barred from participation in the distribution of the assets."

The claim of the Filene Company was filed on September 30, 1913 (Record page 21), and sought payment of (1) the value on December 9, 1912, of the payments under the $20,000 clause and (2) the difference between the rental value of the premises on that date and the rent and other payments reserved (excluding the $20,000 per year), or (3) if it could not have payment of the difference between the rental value of the premises on that date and the rent and other payments reserved (excluding the $20,000 per year), in the alternative, indemnity for the loss of rent and other pay-

ments down to April 1, 1913, and the difference between the rental value of the premises on that date and the rent and other payments reserved under the lease (not including the $20,000 per year). It was found by the Master that the sum of the damages was the same no matter which method of calculation was adopted (Record, page 67).

On December 31, 1913, a first dividend of fifteen per cent. was declared upon claims which had been allowed.

On April 7, 1913, prior to the entry of this order, of December 15, 1913, the receivers filed a petition for instructions relative to their obligation to the Filene Company (Record, page 14). The claim of the Filene Company was considered by the District Court, both under the petition of the receivers for instructions and the proof of claim filed by the Filene Company (Record, pages 59, 78).

The District Judge instructed the receivers that the claim of the Filene Company for matters which arose subsequent to the appointment of the receivers was not provable, and in the same manner disallowed its claim for the damages accrued after the appointment of the receivers (Record, page 73). The grounds of this decision were as follows (Record, page 74):

Decision of District Court.

> "Whatever the effect of the receivership upon the Butler Company's executory contracts not contained in any lease, it effected no breach of any lease under which that company was tenant, nor did it terminate the company's estate in the premises leased . . .
>
> In equity proceedings like these . . . the allowable claims of creditors are not necessarily only those provable as of the date whereon the receivers were appointed. This may be conceded in view of the decision of the Court of Appeals for the Second Circuit in *Penna., etc., Co.* v. *New York, etc., Co.*, 198 F.R. 721, 739, 740. Moreover, this claim is being dealt with not only as presented under the order of November 11, 1912, but also as presented by the receivers' petition for instructions and the claimant's answer thereto. There can be no final order of distribution for some time to come. Although both as to existence and amount the claim was too contingent on November 7, 1912, for allowance as of that date, I must consider it allowable in these proceedings now, if it has since that date become allowable. So far as it will be possible to determine

them at all, before final order of distribution, the contingencies which then affected it have now been determined.

. . . . . .

The decision last above cited affords no support for the contention that a claim for rent, accruing or to accrue after the receivership, under a lease which the receivers have declined to adopt, whether or not it has been terminated by the lessor's entry, is ordinarily a claim provable against the estate in proceedings like these. . . .

In the absence of express provisions such as those quoted by the master from this lease, no allowable claim for future payments under it would in any event have come into being upon or after the lessor's re-entry on December 9, 1912.

. . . . . .

The other creditors, who, in bankruptcy, would have a statutory right to the disallowance of the claim, unless provable under the Act, have here a right to its disallowance unless its own merits, entirely apart from the clause quoted, equitably entitled it to share upon an equal footing with the claims due other creditors interested. . . .

That the remaining covenants above summarized, for acceleration of the payment of all future rental, etc., upon termination of the lessee's tenancy because of its default, would be valid as between the lessor and lessee alone, does not seem to be disputed: but it does not follow that, in equity, they are to be regarded as giving the lessor a right, equal in merit with the right of those creditors of the lessee whose claims were fixed liabilities absolutely owing when the court took control of the estate, or if then contingent, were so only as to their existence or only as to amount, to share in this distribution for the full amount of all the rent it might have got had the lessee remained its tenant and continued to pay rent until 1921, less the stipulated credits, although it has taken back and is not to restore that estate in the premises whose enjoyment by the Butler Company was to furnish the entire consideration for such rent. . . .

The reasons which have been held to forbid the exclusion of claims in proceedings like these, if mature and certain when presented, because they were immature or uncertain in amount on the day when the proceedings were instituted, and to require their allowance if they became

mature or their amount certain within a time not involving delay in distribution, do not go far enough to require the allowance of a claim which, like this, had no existence on the date referred to, but has since come into existence through subsequent dealings wholly between the insolvent and the particular creditor, relating wholly to a leasehold interest forming no part of the estate to be distributed, and is dependent not only for its existence, but also as to the time at which it should come into existence and as to its amount, upon election by the creditor while these proceedings were pending. It is not sufficient for the allowance of such a claim to say that it is presented in time and is not to be excluded because it was not certain at some arbitrary anterior date. It does not seem to me that it is such in its nature as to entitle it to rank with liabilities incurred prior to or concurrently with the receivership, whether then mature or immature, certain or contingent. . . .

In view of the above considerations, my conclusion must be that no claim for the accelerated rentals under the agreements referred to is allowable.

That some elements of conjecture or speculation must of necessity enter into any determination by estimate in advance, of rental values for terms extending so far into the future as these, seems obvious. I am further inclined to agree with the contention of the receivers that, particularly in regard to so much of the instalments to be accelerated as above as was to make up the annual payments of $20,000 per year, the agreements relied on resemble in character agreements for a penalty or forfeiture on termination of the lease rather than agreements for indemnity. . . ."

Thereupon the Filene Company claimed an appeal to the Circuit Court of Appeals for the First Circuit. That Court affirmed the decree of the District Court (Record, page 92). There was, however, a difference between the judges constituting the Court of Appeals as to the grounds upon which the decision was to be supported. Putnam, J., held that a claim of this nature could not be proved in bankruptcy proceedings, and must therefore be disallowed in these receivership proceedings (Record, page 95). The majority of the Court concurred in the opinion below and disallowed the claim as contingent, stating as perhaps an additional ground that other

Decision of Circuit Court of Appeals.

creditors had a right to assume that the present claim could not be proved in bankruptcy proceedings, and that therefore it ought not to be provable in equity receivership proceedings (Record, page 92).

Upon the application for certiorari the Filene Company pointed out that this decision was in conflict with decisions of the Circuit Court of Appeals for the Second Circuit and other Circuits, and with the decisions of the Supreme Judicial Court of Massachusetts, and of this Court.

The case presents the following questions:

First: May any contingent claim be proved?

Second: Is there anything which bars this claim although all other contingent claims may be proved?

Third: Was this claim entirely a contingent claim?

It is submitted, and the Filene Company contends that contingent claims may be proved, in receivership proceedings like these, provided they become fixed before the time for distribution, and secondly, that there is nothing in the nature of this claim which distinguishes it from other contingent claims, so as to prevent its proof. The Filene Company also contends that this claim was in large part fixed, and not contingent at the date of the receivership.

SPECIFICATION OF ERRORS RELIED UPON.

Accordingly, the Filene Company relies upon the following assignment of errors:

That the District Court and Circuit Court of Appeals were in error:

I. In refusing to allow as provable the claim of this claimant for damages arising out of the breach by William S. Butler & Company, Incorporated, of the lease and agreement referred to in the claim filed herein and the entry and termination of the said lease and agreement by reason of said breach.

II. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums (not including the $20,000 payment) due under the lease from the claimant to William S. Butler & Company, Incorporated, from December 9, 1912, to the end of

the term and the rental value on said date of the premises demised under said lease.

III. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums (not including the $20,000 payment) due under the lease from the claimant to William S. Butler & Company, Incorporated, from April 1, 1913, to the end of the term and the rental value on said date of the premises demised under said lease.

IV. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums due under the lease from the claimant to William S. Butler & Company, Incorporated, from December 9, 1912, to the end of the term and the rental value on said date of the premises demised under said lease.

V. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the difference between the rent and other sums due under the lease from the claimant to William S. Butler & Company, Incorporated, from April 1, 1913, to the end of the term and the rental value on said date of the premises demised under said lease.

VI. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for a sum equal to the value on December 9, 1912, of the sum of $20,000 per annum payable in monthly payments for the balance of the term of the lease above referred to, less a discount of five per cent. in accordance with the terms of the said lease.

VII. In refusing to allow as a provable claim the whole or any part of the claim of the claimant for the rent and other payments (excepting the $20,000 payment) due to the claimant under the terms of the lease above referred to for the period from January 1, 1913, to April 1, 1913, less the sums received from subletting the demised premises during said times as set forth in the report of the special master herein.

VIII. In refusing to allow the claim of this claimant in a sum greater than $3,739.48.

IX. In not allowing the said claim of the said claimant in the sum of $215,531.10, as set forth in the summary at the end of the report of the special master herein.

X. In sustaining the exception of the receivers to the Master's report.

XI. In excluding evidence of the negotiations leading up to the execution of the lease referred to in the claimant's claim filed herein, which evidence was in substance as follows, as reported by the special master:

> "Before the execution of the lease to the Butler Company and as part of the negotiations leading up to it the president of the Butler Company sent to the president of the Filene Company a letter, introduced in evidence as Exhibit 31.
>
> The 'Eldridge Circular' referred to in this letter was introduced in evidence as Exhibit 32. It was sent out by the agent of the Filene Company in charge of letting the property to prospective tenants at the time.
>
> After the letter from Butler to Filene (Exhibit 31) an agreement was made between the Filene Company and Butler, marked 'Exhibit 33,' whereby the Filene Company agreed to sublet the properties before mentioned and Butler agreed to take such a sub-lease. The material provision in this agreement was that
>
> > 'the sub-lease or assignment of leases . . . shall provide for the . . . payment . . . of the rent and other payments by said leases required to be made to the lessors and shall provide for the payment to Filene's in addition to all rentals and other payments called for by said leases, of twenty thousand (20,000) dollars per year up to February 28th, 1921, in monthly instalments of one thousand six hundred and sixty-six and 67/100 (1,666.67) dollars per month, beginning whenever possession of the premises is delivered up, and at the same rate for any fraction of a month.'
>
> The time for performing this agreement was extended by mutual consent and on May 29, 1912, the lease (Exhibit 1) was executed in performance of the terms of the agreement."

SUMMARY OF ARGUMENT.

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I. CLAIMS LIKE THAT OF THE FILENE COMPANY ARE PROVABLE, ALTHOUGH CONTINGENT AT THE DATE OF THE APPOINTMENT OF THE RECEIVERS, FOR CLAIMS ARE PROVABLE IN RECEIVERSHIP PROCEEDINGS WHICH ACCRUE PRIOR TO THE DATE FINALLY SET FOR PROVING CLAIMS, ALTHOUGH THEY HAD NOT ACCRUED PRIOR TO THE APPOINTMENT OF THE RECEIVERS 14

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ARGUMENT.

I.

CLAIMS LIKE THAT OF THE FILENE COMPANY ARE PROVABLE, ALTHOUGH CONTINGENT AT THE DATE OF THE APPOINTMENT OF THE RECEIVERS, FOR CLAIMS ARE PROVABLE IN RECEIVERSHIP PROCEEDINGS WHICH ACCRUE PRIOR TO THE DATE FINALLY SET FOR PROVING CLAIMS, ALTHOUGH THEY HAD NOT ACCRUED PRIOR TO THE APPOINTMENT OF THE RECEIVERS.

A. THOSE CREDITORS MAY SHARE IN THE DISTRIBUTION OF THE FUND OF AN INSOLVENT BY A COURT OF EQUITY WHOSE RIGHTS ACCRUE WHILE THE FUNDS ARE IN THE CONTROL OF THE COURT.

The primary point for consideration is whether any claims may be allowed in proceedings like these which did not accrue until after the date of the filing of the bill or the appointment of the receiver.

Upon this point the District Court ruled, and it is submitted correctly, that, "In equity proceedings like these, . . . the allowable claims of creditors are not necessarily only those provable as of the date whereon the receivers were appointed. . . . Although both as to existence and amount the claim was too contingent on November 7, 1912, for allowance as of that date, I must consider it allowable in these proceedings now, if it has since that date became allowable. So far as it will be possible to determine them at all, before final order of distribution, the contingencies which then affected it have now been determined" (Record, pages 77 and 78).

All considerations of equity and right principle unite to support this expression of opinion by the Court.

The problem of what a court of equity should do with the assets of a corporation which it has taken under its control, at first for the purpose of preservation and then for the purpose of distribution, must be determined solely by regard for what is fair and just, — for it must throughout be borne in mind that it is bound, not by any prescribed statutory rule, but only by considerations of what is equitable and fair.

The situation is at the bottom a comparatively simple one. A corporation, whose only substance is of course its capital, has engaged in business, and solicited and obtained credit from those who have cared to deal with it in reliance upon that to which alone they can look for the satisfaction of their claim, viz.: its capital and assets. The creditor looks, of course, in the first instance to the probable excess of assets over liabilities. But he also has in mind the proportion of assets to liabilities in the event of a possible insolvency. It is, therefore, because of the assets that he gives his credit. This credit may be given the corporation in the present sale and delivery of goods to be paid for in the future; it may be in contracting for the future sale and delivery of goods; it may be in contracting to stay in the employ of the company for a definite period of time at a definite rate of compensation; it may be in leasing to the corporation a privilege under a lease having all the characteristics of a lease of real estate except that it deals with a personal privilege and not with real estate. Or it may be in leasing to the company a place of business for a term of greater or less length at a rental to accrue from time to time during the period of occupation.

It is obvious, however, that all of these various creditors enter into their relations with the corporation, be they in the one form or the other in reliance for their fulfilment upon the same thing, viz.: the capital and assets of the company. The creditor who has parted with his goods is not to be regarded in any more favorable light than the one who still has his goods, but has lost the benefit of his bargain by the default of the company on its obligation to take them, or the employee who still has his ability to work, but has lost the value of the company's contract with him; or the owner of a hotel which finds itself with a livery and baggage privilege to let, having lost the value of the contract of an insolvent to pay a certain annual "rental for it," or the lessor who may find the leased premises back on his hands, but has lost the value of his lease. It will appear clear upon reflection that for the realization of the value of the obligation which these creditors have and which was the inducement to cause them to make their contracts, each of them is in exactly the same position as the others, and as all other creditors of the company who are not given definite security for these claims. The measure of the claim of the unpaid seller of goods, or, to put it in other words, the measure of his loss upon the company's default, is the amount which it agreed to pay as the price of the goods; in the case of the one who has contracted to sell and

deliver in the future the measure of the value of the obligation or his loss is the difference between the market value of the goods and the contract price; in the case of the employee it is the difference between what he can probably earn in other employment during the contract period and what he had been promised; in the case of the lessor it is the difference between what he can get in the market for his premises and what had been agreed to be paid. This obligation of the company was the price which it paid for obtaining the contract for goods, service, or the right to occupy.

Unless in all cases the loss of what the obligee expected to earn so far as measurable, is to be eliminated from proof — and no court whether of law, equity or bankruptcy has suggested that that should be done — all of these persons are entitled to the same consideration.

When the company becomes insolvent, and it is necessary to distribute its assets among those who have trusted it on the basis of those assets, equity demands that all obligees be treated with equal consideration. As was early said by the Supreme Court:

> "When this bank became insolvent and all its assets were insufficient to perform its engagements, it is manifest that every part of its assets stood bound by the contracts which had been made with the bank upon the faith of the funds then set apart by the charter."

Curtis, J., in *Curran* v. *State of Arkansas*, 15 How. 304, 315.

There is thus every reason why a court of equity should adopt a method of distribution which will recognize, so far as possible, every person who has relied upon the fund. In such adoption the Court is entirely unfettered. It may select any date it wishes. It is not obliged, like a court of bankruptcy, to look to any particular date provided by statute as determining rights. The only restriction to which it is subject is the natural necessity of winding up the affairs of the corporation as speedily as may be reasonably possible, with due regard to the interests of all involved, creditors and stockholders alike. And in its distribution it may consider further that as a practical matter the corporation is at an end, and any person who has entered into contractual relations with the corporation and has been damaged can never recover any part of these damages except out of this fund, now in the hands of the Court (*Carr* v. *Hamilton*, 129 U.S. 252). It should therefore adopt as the time of distribution such a date as will on the one hand permit as many of

the persons as possible who relied upon the fund to prove their damages, without on the other hand unduly prolonging the winding up of the corporation. Such a date, it is submitted, is the date finally limited for the proof of claims by the Court, upon the consideration of those matters; and every person whose damages can be definitely ascertained by that time should be allowed to prove, and to participate in the distribution of the fund.

This rule, which seems in the mere statement of it so fair and equitable, is amply supported by authority, although the question has not as yet come before this Court.

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. Rep. 721 (C.C.A. 2d).
In re *Mullings Clothing Co.*, 238 Fed. 58 (C.C.A. 2d).
New York Security & Trust Co. v. *Lombard Investment Co. of Kansas*, 73 Fed. 537 (C.C.W.D.Mo.).
Woodland v. *Wise*, 112 Md. 35.
People v. *St. Nicholas Bank*, 151 N.Y. 592.
Kalkhoff v. *Nelson*, 60 Minn. 284.
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. 98.
Spader v. *Mural Decoration Mfg. Co.*, 47 N.J. Eq. 18.
Bolles v. *Crescent Drug & Chemical Co.*, 53 N.J. Eq. 614.
McGraw v. *Union Trust Co.*, 135 Mich. 609.
Hoyle v. *Scudder*, 32 Mo. App. 372.
See *Deane* v. *Caldwell*, 127 Mass. 242.
Reynolds v. *Fuller*, 64 Ill. App. 625.
Chicago Fireplace Company v. *Tait*, 58 Ill. App. 293.
Smith v. *Goodman*, 149 Ill. 75.
Wilder v. *McDonald*, 63 Oh. 383.
In re *Reading Iron Works*, 150 Pa. 369.

In the Federal Courts the most recent and well reasoned case which laid down this rule of distribution (*Pennsylvania Steel Co.* v. *N.Y. City Ry. Co.*, *supra*) arose in the Second Circuit on the following state of facts: The New York City Railway Company was a street railway corporation doing business in the City of New York. The Metropolitan Street Railway Company was another street railway company which had done business in the City of New York. In 1902 the Metropolitan Company leased to the City Company its entire railway system. Prior to the time of this lease, in 1901, the Metropolitan Railway Company had entered into a contract with the Metropolitan Express Company, by which

it granted to the latter the exclusive right of moving express matter over its street railway system and the express company agreed as consideration to pay to the railway company twenty per cent. of the gross earnings of the business. This contract provided that it should bind the successors, assigns, lessees, and transferees of the parties respectively. The lease of 1902 to the City Railway Company provided that the City Railway Company should pay all sums due under this contract with the express company, and that it should assume all obligations of the Metropolitan Railway Company to the express company. In 1904 the American Express Company took over the rights of the Metropolitan Express Company.

The provisions of the contract between the express company and the railway company were duly carried out by the City Company, the lessee, and the American Express Company, the assignee, until September 24, 1907, when receivers of the City Railway Company were appointed. Shortly afterward in October, 1907, the same persons were appointed receivers of the Metropolitan Company, which claimed to be involved in the receivership proceedings of the City Company. Thereafter and until February 28, 1908, the receivers continued to carry out the terms of the express company contract. On that day they notified the American Express Company that they would not adopt the contract, and on March 15, 1908, they discontinued the operation of the express cars.

The American Express Company thereupon terminated its agreement with the Metropolitan Express Company, under which it had agreed to pay certain sums of money for the use of the Metropolitan Express Company's right to the express privilege, and this claim was thereupon presented by the Metropolitan Express Company.

At the time of the appointment of the receivers of the City Railway Company and also of the appointment of the receivers of the Metropolitan Railway Company, both corporations admitted their insolvency and prayed for the appointment of the receivers.

In the Circuit Court the case was referred to a master who rejected the claim on the ground that it was a contingent demand which had not accrued at the time of the appointment of the receivers. Judge Lacombe, sitting in the Circuit Court, confirmed the report of the special master.

Upon appeal to the Circuit Court of Appeals the case was considered by Coxe, Ward, and Noyes, JJ., and it was determined that "claims which when presented within the time limited by the Court for their presentation are certain or are capable of being

made certain by recognized methods of computation should be allowed."

Noyes, J., in his opinion said:

"One more question remains for consideration in formulating any general equitable rule. A time should be stated with respect to which the status of claims should be fixed. The briefs upon these appeals indicate a general impression among counsel that the date of the appointment of the receivers is the time which controls. Apparently this view is based upon the earlier theory of the courts that a creditors' bill is an equitable levy equivalent to a general execution in favor of creditors who at the time it is filed are in a position to obtain execution or attachment. But, as we have seen, the right to share in corporate assets is, at the present time, not confined to creditors who might themselves have instituted separate proceedings, nor are the assets to be shared in those alone which could be seized upon execution. The present extension of equitable jurisdiction over corporations would be wholly unjustifiable if it were for the benefit of a particular class of creditors. Consequently the time of the appointment of the receiver constitutes no logical or necessary date for determining the provability of demands and it should be fixed as equity, with due regard to convenience, may require.

The commencement of the receivership should properly determine the existence of the corporate engagement. The estate should not be liable upon contracts or agreements entered into by the corporation after the appointment of the receiver. But when the engagement exists, we perceive no equitable reason why that time should determine the provability of demands based upon it. Indeed the equitable considerations are rather the other way. There are cases in which the very fact of the appointment of the receiver breaks the obligation and creates the demand. In such cases it is manifestly inequitable that any technical objection should operate to prevent the proof of the claim. So, in many cases, uncertainties regarding claims may be removed soon after the appointment of the receiver and before anything is done towards making up accounts or distributing assets. Claims of this nature should share in the estate. And the effort of a court of

equity should be to have them share. It is not a light thing for a chancery court, acting without statutory direction, to say that a creditor shall lose his demand when he has not been at fault and when the settlement of the estate will not be protracted by allowing it."

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741.

The Circuit Court of Appeals for the Second Circuit in the same receivership thereupon allowed proof of claims which were obviously contingent at the time of the appointment of the receivers, *i.e.*, after accruing rent.

Thus, in the "Second Avenue Bondholders Appeal," 198 F.R. 747, it appeared that the Metropolitan Company had been the lessee of the Second Avenue Railroad Company and had as rental guaranteed the payment of the interest and principal upon the bonds of the Second Avenue Company, and had also agreed to pay 8% upon its capital stock.

The time limited for the proof of the claims of the bondholders was fixed as March 1, 1910. The Circuit Court of Appeals held that the bondholders could prove in the receivership of the Metropolitan Company for all interest coupons which fell due up to March 1, 1910 (198 F.R. 753).

Under the rule of this decision, therefore, the petitioner herein would be entitled to prove at least for all instalments of rent which accrued between November 7, 1912, and December 12, 1913, amounting to $89,571.28.

In the "Crosstown Company's Appeal," 198 F.R. 756, it appeared that the Central Crosstown Railroad Company had in 1904 leased its property to the Metropolitan Company for nine hundred and ninety-nine years from April 1, 1904, for the yearly rental of 15% upon its capital stock and an agreement to pay all taxes upon the property and the assumption of the interest upon its funded debt.

The Crosstown Company lease was disaffirmed by the receivers on May 1, 1908.

The Crosstown Company presented certain claims for

(a) Accrued dividend rentals under leases.

(b) Future damages for breach of the lease.

(c) Payments for special franchise taxes.

It was held by the Circuit Court of Appeals for the Second Circuit that (a) Dividend rentals which accrued October 1, 1907, — after the date of the appointment of the receivers — were provable against the City Railroad Company which had assumed the obligations of the Metropolitan Company; (b) No damages were allowed upon the breach of the lease for future rentals, not because of any consideration that such a claim was inequitable but because, as the Court said, "the whole matter of future damages was and still is a matter of conjecture and guesswork. The claim for such damages was properly disallowed because it was uncertain in amount and there was no method of making it certain."

It is obvious from a reading of this decision that if the lease of the railway had been terminated prior to December 10, 1907 (the date set for proving claims), and the damages had then been fixed, the Court would have permitted the proof of the claim.

"Metropolitan Stockholders' Appeal," 198 F.R. 761.

In this decision the Circuit Court of Appeals for the Second Circuit held that stockholders of the Metropolitan Company could prove against the estate of the Railroad Company for dividends upon their stock guaranteed by the City Company as part of the rental of the Metropolitan Company, which rentals had accrued after the appointment of the receivers, but before the expiration of the date limited for the proof of claims.

The Court disallowed a claim for future rentals, using the following language:

> "Upon the principle stated in the Express Company's Appeal and in the Crosstown Company's Appeal, the claim for future rentals or for future damages for failure to pay rentals was too uncertain for allowance. As the order permitting the filing of this claim was entered *nunc pro tunc* as of December 10, 1907, its status must be fixed as of that date and the question of certainty or uncertainty must be determined by looking into the future as of that time.
>
> In the Express Company's Appeal we held that the confessed insolvency of the City Company followed by its receivership constituted a breach of its contracts. In the Crosstown Company's Appeal we pointed out that while the rule underlying such conclusion might not be altogether applicable to leases, yet that corporate railroad leases differed from leases in general. But as we further indicated, the

breach of a lease does not terminate it. Re-entry, or other action upon the part of the lessor is necessary, unless expressly waived. And, as shown in the statement of fact, this lease stipulated that a default should continue for 12 months before the lease could be terminated. What effect such provision would have in the case of complete inability to perform need not be considered here. It is sufficient for the purpose of this appeal to say that there is nothing in the record to show that this lease terminated before December 10, 1907, the time as of which the claim was filed. At that time it was problematical when the lease would terminate and altogether uncertain what the situation would be upon its termination. The claim . . . was too uncertain for allowance."

It is obvious, therefore, that the Circuit Court of Appeals for the Second Circuit treated the claim as provable if the damages were made certain before the time fixed for the presentation of the claim and gave no particular significance to the fact that the claim arose under a lease, except in determining whether or not the claim was or was not uncertain at the time of presentation.

"Validity of Lease Proceedings," 198 F.R. 765.

In this decision a claim upon a guaranty of the payment of taxes which accrued after the commencement of the receivership was admitted to proof.

Attention was called by the District Court of Massachusetts in its opinion upon the claim of the Filene Company to the statement by the Circuit Court of Appeals for the Second Circuit in discussing the "Express Company's Appeal" that that case was to be distinguished from a case relating to leases of real estate (198 F.R. 744, Note).

It is obvious, however, that what the Circuit of Appeals for the Second Circuit was dealing with was the question of whether an anticipatory breach of a lease creates any immediate claim for damages under the mere agreement to pay rent in the future and the decision is of no other force. This is clear from the language of the Circuit Court of Appeals for the Second Circuit in discussing this "Crosstown Company's Appeal already referred to." It is also made clear by the recent decision of the Circuit Court of Appeals for the Second Circuit in the case of in re *Mullings Clothing Co.*, 238 Federal, 58, decided in November, 1916.

In re *Mullings Clothing Co.*, a corporation tenant of premises under a lease which was to expire on the first day of October, 1914, took a new lease of the premises in July, 1913, for a term of five years to commence upon the expiration of the old term. Some time after the execution of this new lease and shortly before the term was to begin, namely, in August, 1914, a receiver of the company was appointed in a state court under proceedings brought to dissolve the company. The receiver, acting under instructions of the Court which appointed him, repudiated the lease, which was to begin October 1, 1914. The lease provided that in case the rent should remain unpaid for ten days after the same became payable under the terms of the lease, the lease would thereby terminate and the lessor might then recover possession in the manner prescribed by the State Statute relative to summary process, and the necessity of demand on the part of the lessor for rent and for re-entry for condition broken, as at common law, were expressly waived by the lessee.

The receiver and persons claiming under him continued in occupation of the premises until the end of November, 1914, at which time the landlord entered and took possession of the premises. A new tenant was found for the premises in January, 1915, for a term to begin March 1, 1915, and to run for a term of five years at an annual rental substantially less than the rental provided in the lease to the insolvent company. On December 30, 1914, a voluntary petition in bankruptcy was filed by the company and it was on the same day adjudicated a bankrupt. The trustee in bankruptcy promptly repudiated the lease.

The landlord offered for proof a claim for the difference between the rent reserved under the lease to the bankrupt company and the rent obtained under the new lease of the premises.

The District Court rejected the claim on the ground that it was a contingent claim, being in effect a proof of a claim for future rent. The Circuit Court of Appeals for the Second Circuit reversed the decision of the District Judge saying the following:

> "In the case at bar when the directors voted to dissolve the corporation, and all the stockholders united in asking the state court to appoint a receiver under the statute to wind up its affairs, and the receiver was appointed by the Court for that purpose, and he repudiated and abandoned the lease, there was in all this such a repudiation of the lease as amounted to an anticipatory breach, and such a putting it beyond the power of the corporation to

perform its agreement as gave to this plaintiff an immediate right of action for damages. As this Court said in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, *supra*:

> 'The situation is the equivalent either of an out and out repudiation or of a complete disablement, and in either case the contract is broken.'

In such a case the lessor has a right to sue for the anticipatory breach, and a right to be paid his damages out of the assets in the hands of the liquidating receiver. If that were not true, he would be remediless; the corporation being insolvent and determined to cease business and go out of existence. . . .

(2.) From what has been said it is evident that the lessor had a claim for breach of the lease, which could be enforced against the assets in the hands of the receiver, . . .

(7.) The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy is exclusive. In re *Watts & Sachs*, 190 U.S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933 (1903). The appointment of the trustee superseded the jurisdiction of the state court, and the trustee was entitled to the assets in the hands of the receiver and took the property of the bankrupt. That he was not bound by the repudiation of the lease by the Connecticut receiver is clear. He was free to adopt or repudiate the lease within a reasonable time as he might deem for the best interest of the estate. He did not see fit to adopt it and expressly repudiated it. The breach of the contract remained as before, and the landlord still had his right of action. Was it a provable claim in bankruptcy? The District Court, as already stated, thought not because it was a contingent claim.

(8, 9.) The Bankruptcy Act of August 10, 1841 (5 Stat. 440, c. 9) and that of March 2, 1867 (14 Stat. 517, c. 176), provided for the allowance of contingent claims. The present act, however, makes no provision for the proof of such claims, and it is well understood that they are not provable. We have no doubt that, while in this case the lessor's claim was unliquidated at the time the petition in bankruptcy was filed, it was not contingent. The cases already discussed show that it was not contingent. A contingent claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or

not the bankrupt will ever become liable to pay it. If it is certain that he is liable to pay it, although it may be uncertain how much he will have to pay, the claim is unliquidated, but it is not contingent. And if one party to an executory contract renounces it without cause, or disables himself from performing it, the other party may consider the contract as broken and bring an action immediately to recover the damages. The liability in such cases is, therefore, not contingent, but absolutely fixed.

The Bankruptcy Act in Section 63a specifies the debts which may be proved and allowed against the bankrupt's estate. There are five classes of debts so specified. We are not now concerned with any of them, except the fourth, which reads:

> 'Those founded upon an open account, or upon a contract, express or implied.'

It is true that Section 63b provides that:

> 'Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

This, however, relates merely to procedure, and does not define an additional class of debts which are provable. In *Dunbar* v. *Dunbar*, 190 U.S. 340, 350, 23 Sup. Ct. 757, 761 (47 L. Ed. 1084) (1903), the Supreme Court declared that:

> 'That paragraph . . . adds nothing to the class of debts which might be proved under paragraph "a" of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the Court should direct.'

Is the claim which the landlord is seeking to assert one which arises upon a contract? We have no doubt that it is. A claim for damages for the breach of an executory contract is a claim 'founded upon a contract,' within the meaning of the statute, and is provable in bankruptcy. This court so held in re *Frederick L. Grant Shoe Co.*, 130 Fed. 881, 66 C.C.A. 78 (1904), and in re *Stern*, 116 Fed. 604, 54 C.C.A. 60 (1902). A claim for damages for the breach of an executory contract of lease, where the lessee is a corporation and has voted to wind up, and its stockholders have applied to the Court for the appointment of a

receiver to wind up its affairs and to dissolve the corporation, is, in our opinion, a claim founded upon a contract and provable in bankruptcy. The provable debts are those which existed at the time of the filing of the petition in bankruptcy. *Zavelo* v. *Reeves*, 227 U.S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664 (1913). In this case the obligation incurred by the repudiation of the lease existed at the time of the filing of the petition.

(10.) We do not overlook the doctrine that a covenant to pay rent creates no debt until the time stipulated for the payment arrives, and therefore that rent accruing under a lease after the filing of a petition in bankruptcy against the lessee is not provable against his estate as a fixed liability absolutely owing at the time of the filing of the petition. Such a claim we have held to be contingent, and not provable in bankruptcy. That doctrine was applied by this court in re *Roth & Appel*, 181 Fed. 67, 104 C.C.A. 649, 31 L.R.A. (N.S.) 270 (1910), and we have no doubt that it was correctly applied. But that doctrine is not at all relevant to the facts of this case. This is an action for breach of contract, occasioned by the steps taken to wind up and dissolve a corporation, which breach occurred prior to the bankruptcy. It has no analogy to a case of ordinary bankruptcy of an insolvent tenant. The filing of the petition in bankruptcy in such a case does not terminate the relation of landlord and tenant, but the tenant remains liable for the future rent as it accrues. It does not end the capacity of the tenant to engage in future business and to acquire other assets which can be reached by the lessee in subsequent proceedings for the payment of the rent which subsequently accrues. It does not involve an abandonment of the lease, and does not disable the tenant from afterwards performing its covenants."

In *New York Security & Trust Co.* v. *Lombard Investment Co.*, 73 Fed. 537, a case in the Circuit Court for the Western District of Missouri, a bill was filed by the claimant and others suing in behalf of creditors and stockholders against the defendant investment companies, alleging that they were insolvent and praying for the appointment of a receiver, the winding up of their affairs, and the distribution of their assets. The various defendant corporations were interlocking corporations representing the same interests and their business was that of loaning money on real

estate, buying, selling, improving, and leasing real estate and other kinds of property, and issuing their own obligations secured by securities given them for the loans made by them with their own guaranty of the loan made by them. At the time of the filing of the bill there were outstanding a large number of securities representing loans guaranteed by the defendant companies.

There was a reference to a master to determine the claims against the company, and the master filed a report which was fully affirmed by the circuit judge.

The master recited in detail the various forms of guaranties and then proceeds as follows:

> "The questions arising under these different forms of guaranty and the several questions arising out of the situation respecting the validity and provability of claims, I think, after pretty mature consideration should be disposed of as shown by the following classification and principles:
>
> (1) The claims which should be allowed:
>
> Class No. 1 embraces claims which at the time of the appointment of the receivers furnished a present cause of action against the guarantor.
>
> Class No. 2 embraces all direct obligations of the company at the date of said appointment whether due or to become due at some time in the future.
>
> Class No. 3 embraces all claims though not matured, or which did not at the time of the appointment of the receivers constitute a direct obligation, but which have since matured or will have matured, or constitute such obligation before any order of distribution is made.
>
> Class No. 4 embraces claims against any of the auxiliary companies based on bonds executed by such companies as stated on the first page of this report."

The master then concludes that claims which had not matured prior to the order of distribution ought to be rejected, but Classes 1, 2, and 3 ought to be allowed.

With regard to Class 3 he stated:

> "Claims, though not matured, or which did not, at the time of the appointment of the receiver, constitute a direct obligation, but which have since matured, or will have matured, or constitute such obligation, before any order of

distribution is made, should be allowed. If a series of dividends were to be declared, and the proofs and allowance of claims were to be kept open until after the order of distribution, and until the close thereof, the case would be radically different, and such a rule could not be sustained, if for no other reason than that of *ab inconvenienti*, and it would involve the endless confusion and labor pointed out in the Chemical Nat. Bank case, *supra*. But no inconvenience, delay, or embarrassment to the estate can arise from the application of the rule embraced in the classification referred to. This being the case, and as it is clear that a more perfect equity will be reached by refusing to make any arbitrary distinction between the rights of creditors whose claims matured yesterday or to-day, provided they are sufficiently matured before any order of distribution is made, it is my judgment that the classification made in that behalf is the proper one to be made."

New York Security & Trust Co. v. *Lombard Investment Co. of Kansas*, 73 Fed. 537, 546, 547 (C.C. W.D. Mo.).

Outside of the Federal Courts, the question of the provability in receivership or analogous proceedings of claims which did not accrue until after the date of the commencement of proceedings has been considered by a number of State courts, and their decisions have been in accord with the rule laid down in *Penn. Steel Co.* v. *New York City Ry. Co.*

A case similar to the case at bar arose in Maryland where a receiver of a corporation was appointed by the Court under general equity power on account of insolvency. The corporation was lessee of certain premises for a term ending April 30, 1908. The receiver was appointed October 7, 1907, and surrendered the premises as of October 31, 1907. In February, 1908, the lessor having failed to secure a new tenant filed his claim as a general creditor of the estate for six months' rent accruing from November 1, 1907, to April 30, 1908. None of the assets had then been distributed. The first account in the receivership proceedings was filed June 2, 1908, and disallowed the claim. But the appellate court allowed the claim, and said:

"The sole question to be considered is whether the appellee's claim as a general creditor was properly allowed. The appointment of receivers for an insolvent corporation

does not work its dissolution in the absence of a judicial declaration to that effect, nor does it determine the rights of any of the parties concerned.

In the present instance, therefore, the liabilities of the insolvent but undissolved corporation were not affected by the receivership, and its assets were thereby merely impressed with a trust for its creditors.

The claim here in dispute is based upon the stipulation of a lease which was in full force and effect at the inception of the receivership. The abandonment of the demised premises by the tenant and the entry and reletting by the landlord did not relieve the former from liability for the rent under the terms of the lease. Every instalment of rent agreed to be paid was fully matured and the amount of the claim definitely ascertained at the time of the filing of the audits making distribution of the estate. To the allowance of such a claim under the circumstances of this case we can see no valid objection."

Woodland v. *Wise*, 112 Md. 35.

The precise facts in the case at bar arose in a New York case where a receiver was appointed in statutory proceedings for dissolution of a corporation. Although the receiver was appointed under a statute, the provision of the statute was merely that the receiver make a fair and just distribution of the property of the corporation among its fair and honest creditors, so that the case stands as if there were no statute. The corporation was the lessee of premises, and after the appointment of a receiver and his disaffirmance of the lease, the landlord entered and, after thus terminating the lease, re-leased the premises, and offered for proof a claim for indemnity, under a provision of the lease providing that upon entry by the lessor by reason of default, the lessee would indemnify the lessor. The Court of Appeals admitted the claim, and it was said that

"The whole matter is within the discretion of the Court and questions are to be determined upon equitable principles. . . . What the lessor, Mills, did in this case was to present as his claim against the estate . . . an indebtedness which was definite and without any element of contingency. . . . There was no question of contingent liability only to be ascertained to be such by the occurrence of future events."

Gray, J., in *People* v. *St. Nicholas Bank*, 151 N.Y. 592.

In other cases, where receivers have been appointed under state statutes for dissolution of corporations, the statute has been construed not to exclude from proof claims arising after the appointment of the receiver; and such cases have therefore been determined on general equitable principles, and are authorities on the questions here in issue.

Thus in Minnesota a receiver was appointed under a statute for dissolution of an insolvent corporation. The statute applied, as do ordinary equity proceedings, to both solvent and insolvent companies. The corporation was a lessee, and the receiver first occupied the premises. On the receiver's giving them up, the claim of the landlord for damages was allowed on the ground that on the disaffirmance by the receiver there occurred a final breach of the lease, and that any construction of the statute "which would permit the distribution of the assets of a solvent corporation to its stockholders without full payment of all its legal liabilities including damages for breaches of its contracts must be rejected unless its wording and manifest meaning forbid it."

Kalkhoff v. *Nelson*, 60 Minn. 284.
See *Minn. Baseball Co.* v. *City Bank*, 74 Minn. 98.

Similar constructions of the statutes governing appointment of receivers have occurred in New Jersey, where damages arising for breaches after appointment of receivers have been allowed.

Spader v. *Mural Decoration Mfg. Co.*, 47 N.J. Eq. 18.
Bolles v. *Crescent Drug & Chemical Co.*, 53 N.J. Eq. 614.

And in Michigan,

McGraw v. *Union Trust Co.*, 135 Mich. 609.

Analogous instances arise in the case of statutory assignments for the benefit of creditors, where the particular statute does not undertake by its language to give any definition of provable claims, but leaves the determination of provability to general equitable principles.

Thus in Missouri a lessor was allowed to prove under an assignment for the benefit of creditors of a lessee for damages arising by reason of the failure of the lessee to deliver up the premises in as good condition and order as the same were in at the commencement of the term, a breach which did not occur until after the assignment. Judge Seymour D. Thompson said:

"We agree that the possibility of claims of the present kind maturing at some indefinite period subsequent to the assignment ought not to operate to delay the administration of the assigned estate; but where as in this case they do mature in time to be presented to the assignee, to be proved up before him and to receive their ratable share of the proceeds of the sale of the assigned property, without delaying the administration, we see no reason growing out of the language or policy of the statute why they should not be allowed and paid."

Hoyle v. *Scudder*, 32 Mo. App. 372.
See *Deane* v. *Caldwell*, 127 Mass. 242.
Reynolds v. *Fuller*, 64 Ill. App. 134.
Chicago Fireplace Co. v. *Tait*, 58 Ill. App. 293.
Smith v. *Goodman*, 149 Ill. 75.
Wilder v. *McDonald*, 63 Oh. 383.
In re *Reading Iron Works*, 150 Pa. 369.

The case of *Deane* v. *Caldwell*, 127 Mass. 242, decided by the Supreme Court of Massachusetts, which has been cited for the proposition that contingent debts were not provable in bankruptcy or insolvency proceedings is rather an authority for the allowance of the proof of the present claim.

Deane v. *Caldwell* arose under the Massachusetts Insolvency Statute, which contained no specific provisions as to the proof of claims against the insolvent estates of deceased persons.

It appeared that the claimant had made a lease for a term of five years from December 15, 1874. The lessee had paid the rent to June 15, 1875, and had died on September 16, 1875.

On February 19, 1876, the estate of the intestate was represented insolvent and commissioners were appointed, to whom, on April 26, the plaintiffs presented claims: 1st, for the rent due at the time of the death of the intestate; 2d, for damages (treating the lease as broken at the time of the death); 3d, for rent due to the time of the presentation of the claim to the commissioners.

The Court held that the claim for damages could not be proved since the accrual of the future instalments of rent was too uncertain.

The Court, however, allowed proof for instalments of rent which accrued up to the date of the presentation of the claim, using the following language:

"In the case of a living bankrupt or insolvent, any liabilities which could not be proved against his estate are

not discharged by his certificate, and may be afterwards enforced against him. But when the estate of a deceased person is insolvent, there is no debtor surviving, and any claims of creditors that do not ripen into debts which may be sued against the executor or administrator, or proved against the estate, before the final distribution of the assets, are wholly lost.

It is in view of this distinction, doubtless, that the statutes relating to the insolvent estates of deceased persons have not limited the right of proof against the estate to debts due at the day of the representation of insolvency, or of an adjudication of bankruptcy or publication of notice at the commencement of the proceedings, or at any other date before the return of the commission; but have provided, in general terms, for the appointment of commissioners 'to receive and examine all claims of creditors against the estate, and to return a list of all claims laid before them, with the sum allowed on each claim;' and have enacted that 'every creditor of an insolvent estate, who does not present his claim for allowance in the manner herein prescribed, shall be barred from recovering the same, unless further assets of the deceased come to the hands of the executor or administrator after the decree of distribution.' Gen. Sts., c. 99, §§ 2, 21; Rev. Sts., c. 68, §§2, 20; St. 1784, c. 2.

It is not doubted that debts depending upon no contingency, though not payable until a future day, may be proved before the commissioners. *Eaton* v. *Whitaker*, 6 Pick. 465 *Haverhill Loan & Fund Association* v. *Cronin*, 4 Allen, 141. *And it has always been held that any contingent liabilities, arising out of contract of the deceased, which become absolute debts at any time before being presented to the commissioners, may be allowed, although those which do not become absolute debts until after the return of the commission and the distribution of the estate are necessarily cut off.* . . . (Italics not in original.)

It follows that in this case the plaintiff was entitled to prove for the rent which became payable by the terms of the lease, before or after the death of the intestate, up to the time when the claim was presented to the commissioners; but that he was not entitled to prove any claim for or on account of rent payable in the future. As regards the future rent, there has been no breach of the covenant in

the lease that will sustain an action either for rent or for damages. *Daniels* v. *Newton*, 114 Mass. 530."

It is submitted, therefore, that the rule laid down in *Penn. Steel Co.* v. *New York City Ry. Co.* is not only correct in principle, but is amply sustained by the authorities.

If this rule is applied to the present case it is clear the claim should be allowed, for the limit of time for the proof of claims did not expire until December, 1913, and the damages were ascertained and fixed as of December 9, 1912, and before the expiration of the time limited for proof of claims.

No point can be made of the fact that the Court ordered that claims be presented to the receivers made up as of November 7, 1912, the date of the appointment of the receivers. This was an *ex parte* order, obviously not made with the intent of adjudicating what claims were provable at that time. The Court expressly reserves the right to admit any claim for good cause shown, and the opinion of the District Judge conclusively shows that he did not regard the provability of the present claim as depending upon its date of presentation (*supra*, p. 6).

It is also to be noted that this case comes before the Court upon the receivers' petition for instructions, and, being an equity appeal, brings up for review all interlocutory matters.

Railroad Co. v. *Souther*, 2 Wall. 510, 520.

B. THE TIME FOR DETERMINING THE PROVABILITY OF A CLAIM IN BANKRUPTCY DOES NOT FURNISH ANY PROPER ANALOGY FOR RECEIVERSHIP PROCEEDINGS IN EQUITY.

Under the Bankruptcy Act of 1898, a claim to be provable must be absolutely owing or be *debitum in præsenti, solvendum in futuro*, at the time of the filing of the petition, and a contingent claim is probably not provable. It may be argued and was argued by the Circuit Court of Appeals for the First Circuit that bankruptcy thus furnishes an analogy which equity should follow. It is submitted, however, that this is an entirely false analogy.

1. EQUITY DOES NOT FOLLOW THE ANALOGY OF BANKRUPTCY IN OTHER MATTERS RELATING TO THE DISTRIBUTION OF INSOLVENT ESTATES.

In the first place, equity in the Federal Courts does not follow the analogy of bankruptcy in other matters, and there is no reason

why it should adopt as the time for proof of claims the date of the filing of the bill or of the appointment of receivers.

As was stated by Justice Day in the case of *Commercial and Savings Bank* v. *Robert H. Jenks Lumber Co.*, 194 Fed. Rep. 732, in dealing with the right in equity of a creditor holding collateral security to receive dividends without surrendering his collateral.

> "The bankruptcy act applies only to such estates as come under its provisions; it was never intended that this act should govern the administration of equitable doctrines by courts of equity.
>
> Bearing in mind that the bankruptcy act was passed for the specific purpose and relates to the administration of estates under that act, and it does not apply to the administration of affairs in a court of equity, no confusion of opposing rules arises, and the courts will have no difficulty whatsoever in administering bankrupt affairs under bankruptcy rules in a court of bankruptcy, and applying well-settled principles of equity to matters arising in a court of equity."

And in *Kellock's* case, L.R. 3 Ch. App. 769, cited with approval in *Merrill* v. *National Bank of Jacksonville*, 173 U.S. 131, Vice-Chancellor Wood said:

> "It was strongly pressed upon us that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is that this court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the Court of Chancery."

Proof of secured claims.

Thus equity adopts an entirely different rule from bankruptcy in its treatment of the proof of secured claims.

Merrill v. Nat. Bank of Jacksonville, 173 U.S. 131, 146.

Proof of tort claims.

Equity permits the proof of tort claims.

In re *Seaboard Air Line Ry.*, 166 Fed. 376.

Preferences.

Equity does not set aside preferences.

U.S. Rubber Co. v. *Am. Oak Lea. Co.*, 181 U.S. 434.

Priorities.

Nor does it recognize the priority in claims which prevails in bankruptcy; but it may create equitable priorities of its own.

Union Trust Co. v. *Souther*, 107 U.S. 591.

2. THE JURISDICTION OF EQUITY RESTS ON A BASIS FUNDAMENTALLY DIFFERENT FROM THAT OF BANKRUPTCY.

There is no change in the title to the assets in equity.

In the next place there can be no analogy between bankruptcy and equity in this regard, because the appointment of a receiver differs fundamentally from the election of a trustee in bankruptcy.

A trustee in bankruptcy holds the legal title to the assets of a bankrupt corporation, which is transferred to him by operation of law as of the date of the filing of the petition. He can then be properly regarded as holding this legal title in trust for those who have matured claims at the time the trust is created, which are barred by the discharge.

A receiver, on the other hand, is only the arm of the court. He holds no legal title to the property and is not vested by law with any rights in it. Originally receivers were appointed merely for the preservation of the assets,

High, Receivers, Sect. 1,

and until recently there was no jurisdiction in England to appoint receivers for the purpose of conducting the business of a corporation even with a view to winding them up.

In re *Newdigate Colliery, Ltd.*, 1912, 1 Ch. 468, 472.

In re *Manchester & Milford Ry. Co.*, 14 Ch.D. 645, 653.

Gardner v. *London, Chatham & Dover Ry.*, 2 Ch. App. 201.

They are now merely ministerial officers, deriving their authority from the Court appointing them, and in the event of a sale acting under specific instructions of the Court.

Quincy Railroad v. *Humphreys*, 145 U.S. 82, 97, 98.

There is therefore nothing magical about the date either when receivers are asked for or when they are appointed. The legal title to the property is not changed. The Court merely takes it into possession and may determine what to do with it and how to adjust claims against it as it pleases.

There is no discharge in equity.

Equity and bankruptcy as at present administered differ fundamentally in the absence of a discharge of the debts in receivership proceedings. The right to prove in bankruptcy has from the creation of the privilege of a discharge been closely connected with it, for the bankrupt has a right to be discharged from "provable claims," and as will be shown later the present bankruptcy rule as to the proof of contingent claims was as a historical matter determined by consideration of the right to a discharge.

Zavelo v. *Reeves*, 227 U.S. 625.

3. THERE IS NO DEFINITE ANALOGY IN BANKRUPTCY TO BE FOLLOWED.

Furthermore, if the bankruptcy act is to furnish an analogy for the proof of claims in the receivership proceedings it may be pertinently asked which bankruptcy act is to be followed, and what is to happen in a Federal Court when no bankruptcy act is in existence.

Bankruptcy acts in this country have differed widely in their treatment of so-called contingent claims.

Thus, under the first act of 1800 contingent claims were not provable. The act provided that "in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion rate according to the amount of their respective debts."

Act of April 4, 1800, Sect. 31, 2 Stats. 19.

But in the act of 1841 an attempt was made to render contingent claims provable, although not with very much success. The act provided that "other persons having uncertain or contingent demands against such bankrupt shall be permitted to come in and prove such debts or claims under this act."

Act of August 19, 1841, Sect. 5, 5 Stats. 440.
See *Riggin* v. *Magwire*, 15 Wall. 549.

The next act enlarged the provability of contingent claims. "In all cases of contingent debts and contingent liabilities contracted by the bankrupt and not herein otherwise provided for, the creditor may make claim and have his claim with the right to share in the dividends, if the contingency shall happen before the order for the final dividend."

Act of March 2, 1867, Sect. 19, 14 Stats. 517.

Under the act of 1898 there is a conflict of authority as to whether any contingent claims are provable.

See Remington on Bankruptcy, 640.
Zavelo v. *Reeves*, 227 U.S. 625.
In re *Smith*, 146 F.R. 923 (District Court, District of Rhode Island).
Martin v. *Orgain*, 174 F.R. 772 (C.C.A. 5th).
Moch v. *Market Street National Bank*, 107 F.R. 197 (C.C.A. 3d).
In re *Senner Glass Co.*, 135 F.R. 77 (C.C.A. 2d).
In re *Lyons Beet Sugar Refining Co.*, 192 F.R. 445 (District Court for Southern District of New York).
Ludlow v. *Pugh*, 213 F.R. 450 (C.C.A. 3d).
In re *Desnoyers Shoe Co.*, 227 F.R. 401 (C.C.A. 7th).
Slocum v. *Soliday*, 183 F.R. 410 (C.C.A. 1st).
In re *Roth & Appel*, 181 F.R. 667 (C.C.A. 2d).

In the case of in re *Smith*, 146 F.R. 923, a claim against an indorser was held provable, although default by the principal and notice of protest did not occur until after the bankruptcy.

In *Martin* v. *Orgain*, 174 F.R. 772, the Circuit Court of Appeals for the 5th Circuit, Judge Pardee speaking for the Court, stated that in its opinion the claim of a lessor upon a lease was provable in bankruptcy if fixed before the claim was presented for proof, although contingent at the date of the petition in the same manner as the claim against an indorser upon commercial paper.

In *Ludlow* v. *Pugh*, 213 F.R. 450, the Circuit Court of Appeals for the Third Circuit held a claim substantially like the present provable in bankruptcy although the termination of the lease occurred after the petition.

In re *Desnoyers Shoe Co.*, 227 F.R. 401, the Circuit Court of Appeals for the Seventh Circuit held that where the United Shoe Machinery Company leased certain machinery to the Desnoyers Shoe Company, the lease containing the following provision: "If

the lessee becomes insolvent or bankrupt . . . then . . . any or all leases of or licenses to use machinery then existing between the lessor or the lessee . . . shall, at the option of the lessor, cease and determine," and the lessee became bankrupt, and five days afterwards the lessor gave notice that it had elected to terminate the leases, a claim for damages arising upon such termination was provable.

In the case of in re *Smith*, 146 F.R. 923, Judge Brown said:

> "It is argued that, because subdivision 1 (of Section 70 of the Bankruptcy Act) specifies a fixed liability absolutely owing, it excludes all liabilities which were contingent at the time of filing the petition from proof under other subdivisions. The logical fault is obvious. While contingent liabilities are excluded from class 1 (defined by subdivision 1) it does not at all follow that liabilities now or formerly contingent are excluded from other distinct classes. The specification of certain characteristics for class 1 is no indication that cases comprehended in other classes may not have entirely different characteristics. Assuming that, so long as it is uncertain whether a contract or engagement will ever give rise to an actual liability and that so long as the demand is contingent, it is not provable, it by no means follows that a demand which has ceased to be contingent before proof should be rejected because it had been contingent before the date of filing the petition. While the language, 'Debts of the bankrupt . . . which are founded upon an open account, or upon a contract express or implied' may not include contingent obligations, it does include obligations no longer contingent, though they were contingent at the date of filing the petition."

It certainly would be a peculiar doctrine that equity, which is nothing if not an orderly system of administration, based upon what are generally regarded as fixed and permanent equitable principles, should shift from time to time with every change of legislation not pertaining to equity itself, but to an entirely different system of administration.

4. IF THE ANALOGY OF BANKRUPTCY IS TO BE FOLLOWED, THE RULES PREVAILING WHEN THERE WAS NO RIGHT OF DISCHARGE IN BANKRUPTCY SHOULD BE FOLLOWED.

Lastly, and as finally determining the futility of any such analogy, bankruptcy itself in the absence of a discharge adopted, as the rule for the proof of claims, the rule for which the present claimant contends, viz., that any claim might be proved which accrued while the fund to be distributed was in the hands of the distributing tribunal. This is conclusively shown by the history of the English bankruptcy acts.

Under the bankruptcy statutes prior to that enacted as 7 Geo. I., c. 31, a creditor was not allowed to petition or prove unless his debt was presently due (whether contingent or not), that is to say, unless he could at that time have brought suit for the amount of it (*Long* v. *Bland*, Bunb. 120). But the cases show that when any such debt became due, although contingent at the time of bankruptcy, the creditor could come in and prove it.

Holland v. *Calliford*, 2 Vern. 662.
Cf. *Ruggles Case*, Hob. 287.

The preamble to 7 Geo. I., c. 31, refers to creditors upon securities whose debts had not become due at the time of the petition as follows: "whereas it is doubtful in such cases whether such persons . . . should be let in to prove their debts or be admitted to have any dividend or other benefit before such time as such securities become payable." . . .

This statute permitted creditors whose debts were not due until a future day to prove them at once with a discount of 5%. But "contingent debts are said not to be included in the statute of 7 Geo. I., because it being uncertain whether they shall ever become due or not, it is impossible to make such abatement of 5 l. per cent. as the act directs, and therefore they cannot be within it."

Cooke, Bankruptcy, 8 ed., * p. 192.
Tully v. *Sparks*, 2 Ld., Raym. 1546.

There is no reference to any barring of contingent claims in the earlier treatises on bankruptcy. On the contrary, the indications are that in any case the creditor whose claim matured before the distribution might prove.

Johnstone, Bankrupts (1656).
Goodinge, Bankrupts (1704); see pp. 48 and 49.

In *ex parte Caswell*, 2 P. W. 497, decided in 1728, there is this dictum:

> "If the debt were contingent when he became a bankrupt, yet if the contingency happened before the distribution made, then such contingent creditor should come in for his debt; so if such contingency happened before the second dividend made, the creditor should come in for his proportion thereof though after the first dividend."

In the case of *ex parte Greenaway*, 1 Atkyns, 113, decided in 1740, there was a bond to pay the wife, if she survived. The bankrupt died during the pendency of the proceedings before any distribution. The case was settled and so no decision was actually entered, but during the argument Lord Hardwicke says:

> "The question is whether this is not a debt become due before the estate is distributed and it would be the hardest case in the world if such a person should not be admitted a creditor before the estate is divided away."

Then came the case of *ex parte Groome*, 1 Atkyns, Rep. 115, decided by Lord Hardwicke in 1744. *Ex parte Groome*, as is pointed out in a note to *Holland* v. *Calliford*, 2 Vernon, 662, is the case which establishes the distinction as to proof of claims "drawing the line at the time of bankruptcy."

Ex parte Groome case arose after the enactment of 5 Geo. II., c. 30, in which was an elaborate revision of the existing statutes, and which provided for a discharge of the bankrupt from all debts which existed at the time of the suing out of the commission.

The earlier bankruptcy acts (34 and 35 *Henry VIII.*, Chap. 4, 13 *Eliz.*, Chap. 7, 1 *Jac. I.*, Chap. 15, 21 *Jac. I.*, Chap. 19) were penal statutes to prevent frauds by bankrupts upon their creditors. Debtors were punished for certain acts by having their goods taken away and distributed among their creditors, and under these earlier statutes the bankrupts remained liable for such portion of their debts as were not satisfied by the dividends received in bankruptcy.

34 and 35 *Henry VIII.*, Chap. 4, Section 6.

The policy of granting a discharge to a bankrupt was first introduced by the statute of 4 and 5 *Anne*, Chap. 17, enacted in 1704 (which remained in force only a few years). The language

of the pertinent section of this statute (Section 7) expressly limited the discharge to claims which had accrued prior to the debtors becoming bankrupt. This section was as follows:

> "And be it further enacted by the authority aforesaid, that all and every person and persons so becoming bankrupt as aforesaid, who shall within the time limited by this act, surrender him, her, or themselves to the major part of the Commissioners therein named, and in all things conform as in and by this act is directed, shall be discharged from all debts by him, her, or them due and owing *at the time that he, she, or they did become bankrupt*, and in case such bankrupt shall afterwards be arrested, prosecuted or impleaded for *any debt due before such time as he, she, or they became bankrupt*, such bankrupt shall be discharged upon common bail, and shall and may plead in general, that the cause of such action or suit *did accrue before such time as he became bankrupt*." (Italics not in original.)

This provision as to discharge was included in the act passed in the reign of George 2d (5 George II., Chap. 30), which was the foundation of the modern bankruptcy acts, and the act under which *ex parte Groome* and the other leading cases as to the provability of contingent debts were decided.

5 *George II.*, Chap. 30, Section 7.

In his argument in *ex parte Groome*, counsel for the creditor points out, "Before the statute of 7 Geo. I., chap. 31, there was no doubt at all but the creditor might come in when the debt became payable, but the only doubt was whether they might come in before."

In making his decision the Lord Chancellor uses the following language and reasoning:

> "The question turns on the new act of parliament of the 5th of *George* the Second, *chap.* 30, *sec.* 7. I think that the privilege of creditors to come in and bankrupts to be discharged from debts, is co-extensive and commensurate, and very equitable; for it would otherwise make an inequality among the creditors, for a creditor, whose debt was due before the taking out of the commission, shall perhaps have no more than 5 s. in the pound, and this creditor, whose debt was not due till a second distribution,

shall come in for as much as the other creditor, and likewise have a remedy open to him for the rest against the bankrupt. . . .

There is no such thing as drawing a line between the contingency not happening before the bankruptcy, and yet happening before the time of distribution; this would not only be a hardship on the bankrupt, and on the rest of the creditors whose debts were actually due, but would have given the contingent creditor a superior privilege, by leaving it open to him to recover the remainder of the debt against the bankrupt.

The case of *Groome* may have hardships, and I am sorry for it; but, as the law now stands, I cannot determine otherwise. I hope, however, as I said before, some gentleman will think of a clause by way of amendment to this last bankrupt act, which may remedy and settle this for the future."

Similarly in the case of *Wiley* v. *Wilkes*, 2 Douglas, 523, decided in 1780, which was a question of the provability of a claim on an annuity, Lord Mansfield said:

"The present case arises on a bankruptcy. It is to be lamented that so large a class of creditors as annuitants are should be left only to a fruitless remedy against the bankrupt. It is also hard upon an honest bankrupt, who has given up his all to his creditors, that he should still continue answerable for debts which he has nothing to satisfy. This is a great defect and chasm. It is a pity that the legislature should be silent, and should force the Courts in order to attain the ends of justice to invent legal subtleties which do not come up to the common understanding of mankind."

The ground, therefore, for establishing the date of the bankruptcy as the day of cleavage was that that was the time as of which the statute by its express language determined the claims from which the bankrupt was discharged. The statement sometimes made that the rule depends upon equitable principles and not upon the express language of the statute is therefore of doubtful accuracy. After the introduction of the provision for a discharge it would have been unfair to the bankrupt and the other creditors alike to have allowed a claim depending on a contingency happening after the date of bankruptcy, but before the

distribution as under the older cases, as the holder of such a claim might obtain his dividend and hold the bankrupt subsequently for the balance, since his claim not having "accrued" before the bankruptcy, was not discharged.

Every subsequent English and American bankruptcy act has contained a provision for a discharge, so that the same reasoning would apply. The whole subject of contingent claims, therefore, became a creature of statute, for in the absence of any provision allowing contingent claims to be proved, they could not be proved under a statute allowing discharges on the reasoning of *ex parte Groome*. But where there is no provision for discharge, the older authorities in England conclusively establish the doctrine that the right to prove continues while the fund is in the hands of the Court for distribution.

It is obvious, therefore, from the foregoing that no analogy exists between the date of filing the petition in bankruptcy and the date of the appointment of receivers in equity, as the time for the proof of claims. As was well said by Judge Noyes:

> "The present bankruptcy law which deals with individuals as well as corporations and has regard to the rights of discharge can hardly be regarded as a guide in a purely equitable matter affecting corporations alone."
>
> *Penn. Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721, 739.

C. THE CASES APPARENTLY HOLDING A DIFFERENT VIEW ARE DISTINGUISHABLE, AND THE REASONING UPON WHICH THEY ARE BASED IS NOT LOGICAL.

There are cases in the reports in which courts have held in particular proceedings that only those claimants who had existing claims at the commencement of the proceedings for distribution could prove. The cases arising in bankruptcy are of course the leading examples of this rule, but, as has already been pointed out, the right to prove in bankruptcy is tied up with the right to a discharge, and based upon this and upon the language of the statute the courts have held the date of the petition to be a day of cleavage under the particular language of the particular statutes.

The cases involving the distribution of the assets of insurance companies go upon the ground that the occurrence of the insolvency is a breach of the contract between the company and the

insured, that the exact damages suffered by the insured are determined as of that date, so that he might, for example, go out and buy new insurance at that time and that events occurring subsequently, such as the occurrence of the loss, should not be allowed to increase the amount of the damages.

Commonwealth v. *American Life Ins. Co.*, 162 Pa. 586.

Universal Life Ins. Co. v. *Binford*, 76 Va. 103.

Boston & Albany R.R. Co. v. *Mercantile Trust & Deposit Co.*, 82 Md. 535.

There are some dicta in cases arising under the national banking act which depend upon the language of that particular statute.

Various grounds upon which the date of the appointment of receivers is urged as the time for the proof of claims, besides the analogy of bankruptcy already treated, *supra*, will be found on examination to be untenable in principle. Thus, —

(1.) It has been said that a bill for a receivership is an equitable levy equivalent to a general execution in favor of creditors who at the time it is filed are in a position to obtain execution or attachment. But this argument of the earlier cases has been answered by the later development of the jurisdiction.

> "The right to share in corporate assets is, at the present time, not confined to creditors who might themselves have instituted separate proceedings, nor are the assets to be shared in those alone which could be seized upon execution. The present extension of equitable jurisdiction over corporations would be wholly unjustifiable if it were for the benefit of a particular class of creditors. Consequently the time of the appointment of the receiver constitutes no logical or necessary date for determining the provability of a demand, and it should be fixed as equity, with due regard to convenience, may require."

Noyes, J., in *Penn. Steel Co.*, v. *New York City Ry. Co.*, 198 Fed. 721, 740.

(2.) It is sometimes argued that a trust is created at the time of the appointment for those claims then matured. But there is then no conveyance of any title to the receiver, and if there were there is no objection to including among the *cestuis*

contingent claims. In assignments in trust for creditors such claims may be included.

Hoyle v. *Scudder*, 32 Mo. App. 372.

(3.) The argument of inconvenience is easily met. There is no inconvenience if the damages can be definitely ascertained before the time for distribution.

See *Penn. Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721, 740.
N.Y. Security & Trust Co. v. *Lombard Ins. Co. of Kansas*, 73 Fed. 537, 546.
Hoyle v. *Scudder*, 32 Mo. App. 372.

(4.) It is said that in contemplation of law, equity distributes the fund the instant it seizes it, and can therefore distribute it only among claims then determined. This is at best a fiction, invoked without reason; and in the present case the receivers were at first appointed to preserve the assets, including the present lease, on the distinct allegation that thus in course of time the assets would prove more valuable.

Some reliance may be placed by the receivers on the *dictum* in *Merrill* v. *National Bank of Jacksonville*, 173 U.S. 131, to the effect that upon the insolvency of a corporation its assets become a trust fund for the benefit of its creditors whose rights must be deemed vested at the time of the creation of the fund.

In *Merrill* v. *National Bank of Jacksonville*, this court dealt with the question of the right of a secured creditor to realize upon its security and to prove in full for the personal obligation of the debtor in insolvency proceedings under the National Bank Act.

The statement that the creditors' rights vested at the time of the insolvency was not necessary to the decision since the decision may well and properly be supported on the ground that it would be inequitable to cut down the secured creditors' rights under his contract by reason of his diligence in realizing upon the security. The latter would be the result of adopting as the rule the rule which prevailed in England, *i.e.*, that the secured creditors' rights of proof were to be determined by the amount due upon its claims at the time they were presented for proof.

Kellock's Case, L.R. 3 Chancery Appeals, 769.
Mason v. *Bogg*, 2 Myl. & Cr. 443.

Nor are the decisions that interest stops at the date of the appointment of the receivers in equity of importance in this connection since such delay as occurs in the administration is the result of the act of the law and the denial of interest may be based upon this rather than upon any fiction that a trust fund is created only for creditors whose rights are fixed at the time of the creation of the fund.

To argue that the trust fund is only for creditors whose rights are fixed is to beg the question. The question is whether in equity creditors under existing contracts whose rights are not fixed at the time of the appointment of receivers, but become fixed later, ought in equity and justice to be permitted to share in the fund.

The receivers cited at the argument below a number of decisions which are distinguishable for the reasons just set forth. Certain of these cases may be noted more particularly.

Wells v. *Hartford Manila Company*, 76 Conn. 27, cited by the receivers, held that a receiver might terminate an executory contract of sale without subjecting the estate to a claim for damages, and that claims which had accrued at the time of the appointment of the receiver had a prior right to the assets.

This case proceeds upon the theory that the receivership is a trust for particular creditors. For this theory there is no foundation. The Court also argues that a receiver ought not to be put in the position of being compelled to subject the estate to a claim for damages if he elects not to adopt an executory contract. This overlooks the fact that the determining principle by which the receiver is to be governed in his decision is that of whether the contract will or will not be of benefit to the estate if performed. The receiver is therefore concerned merely with the value of the contract to the corporation, and this value is distinct and not necessarily related to the value of the contract of the claimant. It is this latter value which forms the basis of the claim for damages. There is no logical reason why a receiver who decides that a contract is not of value to the estate should thereupon be permitted to discard it and destroy the value which it has to the claimant.

The case of *Coy* v. *Title Guaranty & Trust Co.*, 198 Fed. 275, cites and follows the reasoning of *Wells* v. *Hartford Manila Company*.

The case of *Malcolmson* v. *Wappoo Mills*, 88 Fed. 680, proceeds upon the theory that a breach of an executory contract of employment by a receiver is like the breach of such a contract caused by reason of the death of an employer: *i.e.*, a breach for which there is no recovery of damages. This doctrine, of course,

is not applicable to an executory contract for the sale of goods or to leases.

In the case of *Fidelity, etc., Company* v. *Armstrong*, 35 Fed. 567, the District Judge construed the language of the National Banking Act so as to confine the proof of claims against insolvent banks to creditors, and held that the act did not include as creditors those who did not have accrued claims at the time of the insolvency.

The case of *Gay Manufacturing Co.* v. *Gittings*, 53 Fed. 45, was a case in which a guarantor corporation had been placed in the hands of receivers. No proof was allowed by the Court upon a guaranty where the breach had not yet occurred at the time when proof was offered. This, of course, is a proper ruling and does not in any way militate against the position taken by the Filene Company in these proceedings.

People v. *Metropolitan Surety Company*, 205 N.Y. 135, arose in the administration of the estate of an insolvent surety company. It was held that the date of the appointment of receivers should be the day of cleavage, on the theory that everything was theoretically distributed on that date among creditors who then had accrued claims and who might by exercising their legal rights have exhausted the property at that time. This is on the theory either of a trust or of an equitable execution, both of which are, as has been pointed out, illogical.

It is submitted that these cases and others cited by the receivers do not in any way affect the reasoning of the authorities cited in the earlier portions of this brief, and that both upon principle and upon authority this Court should follow the rule of the Circuit Court of Appeals in the Second Circuit and adjudicate that claims which became accrued claims prior to the date finally set for the proof of claims may be allowed herein, although they were contingent either as to existence or as to amount at the time of the appointment of the receivers.

The District Court properly held that this rule was correct.

It may therefore be confidently said that upon a consideration of all of the decided cases, the preponderance of the authority is largely in favor of the view that where the Court is not limited by the provisions of statutes, but is asked to administer the estate upon equitable principles, those claims may be proved which are of such a character that they may be valued prior to the time of distribution without holding up the distribution for an inequitable period of time.

It is just that this rule should be adopted. As has been said

above a corporation does business upon the credit of its capital. Persons doing business with it trust it upon the basis of its capital. When its capital assets are taken in hand by a court for distribution among those persons who are justly entitled to them, it is obvious that the assets ought to be distributed among those persons who have trusted the corporation upon the basis of those assets, and that only clear considerations of practicability should cause the Court ever to close the doors against any such person. There is no reason in logic, equity, or in the practical nature of things why a claimant having a claim of undoubted value and merit, who has trusted a corporation upon the basis of its assets, should be barred from sharing in those assets because at a particular time the Court said that that corporation should refrain from carrying on its business. To bar such a creditor would obviously result in an unfair preference to other creditors. The fact that the Court has taken possession of the property and is attempting to administer it in the most just manner is an answer to the claim that the creditors who have matured claims might proceed to judgment and levy upon the assets of the corporation. If that argument were proper, then only those persons would have the right to share whose claims were at the time of the insolvency in a suable state, which would bar from consideration persons having debts absolutely due but payable in the future. That the latter are not to be barred is conceded by every one.

D. IN ANY EVENT CLAIMS SHOULD BE ALLOWED WHICH ACCRUED BEFORE THESE PROCEEDINGS BECAME IN FACT PROCEEDINGS FOR DISTRIBUTION AS DISTINCT FROM PROCEEDINGS FOR CONSERVATION OF THE ASSETS WITHOUT DISTRIBUTION, AND THESE PROCEEDINGS DID NOT BECOME SUCH PROCEEDINGS FOR DISTRIBUTION UNTIL A DATE SUBSEQUENT TO THE ACCRUAL OF THE CLAIMANT'S CLAIM.

It will be noted that the receivership in the present case was not created originally for the purpose of distributing the property of the corporation. As was pointed out by the Circuit Court of Appeals for the First Circuit in another connection the only purpose of the creation of the receivership in the present case was to preserve the assets of the company.

In re *Wm. S. Butler Co.*, 207 Fed. 705.

No step was taken by the District Court looking to a distribution until after the date of default under the lease and entry

by the claimant. It would not be consistent either with reason or justice to bar from participation a claimant whose claim was liquidated and ascertained when the Court determined that the proceedings should be continued only for the purposes of distribution, on the ground that when the Court took the corporation under its protection for the very purpose of preserving the value of this claimant's claim he had no right to sue for damages.

The cases that are relied upon to support the contention of the receiver that the claimant's claim is not provable proceed upon the theory that the rights of the parties must be fixed at the moment when the Court takes the assets in hand for the purpose of distribution, that in theory the Court could distribute them at that instant, and that those who are presently entitled should not be prejudiced by the delay.

Passing by for the moment the fact that the jurisdiction of the Court is sought in proceedings of this kind for the express purpose of realizing a greater value for the assets by conserving them and applying them over a period of time, it is to be noted that this argument leads to the selection as a day of cleavage of the date when the Court takes jurisdiction for distribution.

In the present case, although the bill prayed for a determination of the claims against the corporation and the distribution of the assets of the corporation, the Court in assuming jurisdiction ignored this prayer, and appointed a receiver merely for the purpose of preserving the assets of the Butler Company, on the theory that the company might by an extension of credit reach a position of ability to meet its obligations.

As is said by Bingham, J., in the decision just referred to, considering the effect of the appointment of these receivers as an act of bankruptcy:

> "Then, again, the prayers of the bill were granted only to the extent that they contemplated and sought the appointment of receivers to assume control of the business and conduct the company's affairs until otherwise ordered by the Court. The prayer wherein it was asked that the plaintiff's indebtedness and that of other creditors be determined, and that the assets of the company, if they were insufficient to pay its indebtedness in full, should be equitably distributed, was not covered by the decree. This being so, the decree is alone consistent with the idea that it was made with a view to the preservation of the value of the defendant's assets as a going concern and of

enabling the debtor, through an extension of credit and a continuation of its business, to realize a sum sufficient to pay its debts in full and to avoid insolvency if possible. In fact, all the allegations of the bill, so far as they were recognized by the decree, are consistent with the main allegation that the defendant was unable to meet its obligations in the ordinary course of business, and it seems to us that it would be putting upon them a strained construction to hold that the debtor, by admitting in its answer that its property was of great value, thereby admitted that it was insolvent in fact (that is, in the bankruptcy sense), and that the Court made use of it as one of the grounds on which to base its decree appointing receivers."

In re *Wm. S. Butler & Co.*, 207 Fed. 705, 711.

It is a necessary conclusion, therefore, in the present case that the Court did not take the assets of this company into its hands for distribution until it entered its decree in December, 1913, allowing and disallowing claims out of these assets. At no prior date was this jurisdiction to distribute assumed. The order for the proof of claims on November 11, 1912, was a mere order to determine the parties. Despite the order to sell the assets (which was, furthermore, after the date when the claimant's claim accrued), the proceedings might nevertheless have been ended by turning the proceeds back to the company. In fact, therefore, as has been stated, the date of assumption of jurisdiction to distribute did not occur until December, 1913. At that time there can be no doubt that the claimant's claim was fixed.

The same result as that contended for above is reached in cases in which there is an interval between the filing of a bill for a receiver for the express purpose of distribution of the funds of a corporation and the actual appointment.

In such cases it is held that at least up to the date of the appointment the receiver has no title, the right to set off exists, and provable claims may be created against the corporation.

Jones v. *Arena Pub. Co.*, 171 Mass. 22, 27.
Illinois Steel Co. v. *Putnam*, 68 Fed. 515 (C.C.A. 5th).
Artisans' Bank v. *Treadwell*, 34 Barb. 553.
Smith v. *Nursery & S. Co.*, 109 Ia. 51.
Woods v *Ellis*, 85 Va. 471.
Cf. *Carr* v. *Hamilton*, 129 U.S. 252.
High, Receivers, Sect. 136.
Beach, Receivers, Sect. 217.

In *Jones* v. *Arena Pub. Co.*, 171 Mass. 22, creditors were allowed to prove on commercial paper executed between the date of the filing of the bill and the appointment of the receiver.

In *Illinois Steel Co.* v. *Putnam*, 68 Fed. 515, a bill was filed by a stockholder, seeking a receiver to manage and operate the corporation, which contained no prayer for the distribution of the property of the corporation. It was held that the corporation might prior to the appointment of a receiver convey its property away.

In *Carr* v. *Hamilton*, 129 U.S. 252, the Supreme Court recognized as proper an adjustment of the rights of policyholders in an insolvent insurance company as of the date of the appointment of the receiver, although that was some time later than the filing of the bill.

In the present case it would be a strange result that upon a court taking jurisdiction for the purpose only of preserving the assets of the company, the rights of the parties should be determined upon the theory that an immediate distribution had taken place when in fact no distribution might ever take place.

II.

THE PRESENT CLAIM IS FROM ITS NATURE ENTITLED TO PROOF.

A. IT IS A CLAIM FOR A SUM IN GROSS REPRESENTING COMPENSATORY DAMAGES, AND NOT A CLAIM FOR RENT.

The Filene Company seeks to recover simply the damages caused to it by the breach of the lease. It seeks for no penalty nor for anything not presently due to it in equity and good conscience.

If it be conceded that claims which accrue upon existing contracts are allowable in these proceedings, although they did not accrue until after the appointment of the receivers, it is difficult to conceive any possible objection to the allowance of the present claim of the Filene Company.

There seems to be no question but that this claim would be allowed had it been a claim arising upon practically any other sort of an agreement except that relating to the lease of real estate. It is not suggested that the claimant has not suffered all the damages which it seeks to prove, nor that it did not trust the Butler Company upon the faith of the very thing which induced other creditors to deal with the Butler Company.

This Court, however, in the case of *Central Trust Company* v. *Chicago Auditorium*, 240 U.S. 581, at 590, referring to decisions in bankruptcy, to the effect that landlords' claims for rent to accrue in the future could not be proved in bankruptcy, said:

> "Cases of the latter class are distinguishable because of the 'diversity betweene duties which touch the realty and the meere personalty.'" Coke upon Littleton, 219 (b), Section 513.

It was principally by reason of a supposed deduction from this distinction or diversity that the District Court and the Circuit Court of Appeals denied the right to prove to the Filene Company and a consideration of this difference is essential to a proper understanding of that which the claimant sought to prove, and particularly to show that it is not rent nor does it partake of any of the characteristics of rent. And it is submitted that upon consideration it will appear that the distinction between real estate and personalty to which Lord Coke referred has for the present purpose and so far as the present claim is concerned no bearing whatsoever.

The section of Coke to which the Supreme Court referred was as follows:

> "But if a man letteth land to another for a yeare, to yeeld to him at the feast of S. Mich. next insuing 40s. and afterwards before the same feast hee releaseth to the lessee all actions, yet after the same feast hee shall have an action of debt for the non payment of the 40s. notwithstanding the said release. *Stude causam diversitatis* betweene these two cases.
>
> 'RELEASETH all actions' This release shall not barre the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent become due, the rent is avoyded; for it is to be paid out of the profits of the land, and it is a thing not meerely in action, because it may be granted over. But the lessor before the day may acquite or release the rent. But if a man be bound in a bond or by contract to another to pay a hundred pounds at five several daies, he shall not have an action of debt before the last day be past; and so note a diversity betweene duties which touch the realty, and the meere personalty. But if

a man be bound in a recognizance to pay a hundred pound at five severall dayes, presently after the first day of payment he shall have execution upon the recognizance for that summe, and shall not tarry till the last bee past, for that it is in the nature of severall judgements. And so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise, after the first default an action of covenant, or an action upon the case doth lie, for they are severall in their nature. Lastly, note a diversity between debts and covenants, or promises.

If a man hath an annuity for terme of yeares, or for life, or in fee, and he before it be behind doth release all actions, this shall not release the annuity, for it is not meerely in action, because it may be granted over."

Lord Coke referred then to a claim for "rent" as a claim which did not arise out of any personal contract, but arose out of the land granted and did not accrue until the rent day.

The obligation to pay rent was in itself originally not an obligation arising out of any contract, but arising out of the relation of Lord and tenant, Sovereign and subject.

In Coke upon Littleton, 141 (b), Section 213, Rent is defined by the learned author as follows:

"Three manner of rents there be, that is to say, rent service, rent charge, and rent secke. Rent service is, where the tenant holdeth his land of his lord by fealtie and certain rent, or by homage fealtie and certaine rent, or by other services and certaine rent. And if rent service at any day, that it ought to be payed, be behinde, the lord may distraine for that of common right.

Some have divided rents into foure kindes, viz. rent service, rent charge, rent distreynable of common right (whereof somewhat shall be said in this Chapter) and rent secke.

'Rent,' in *Latine redditus* (a) by some *dicitur a redeundo quia retroit et quotannis redit.* And others say it is derived of *reddere*, for that the rent is reserved out of the profits of the land, and is not due till the tenant or lessee take the profits; for *reddendo inde* or *solvendo*, or *reservando inde*, or the like, is as much to say as the tenant or lessee shall pay so much out of the profits of the lands; for *red-*

dere nihil aliud est quam acceptum aut aliquam partem ejusdem restituere. Seu reddere est quasi retro dare, and hereof commeth *redditus* for a rent."

142 *a*. "Rent service." "It is called a rent service, because it hath some corparall service incident unto it, which at least is fealty, as here it appeareth.

'His land.' A rent service cannot be reserved out of any inheritance but such as is manurable, whereinto the lord may enter and take a distresse, as in land and tenements, reversions, remainders, and, as some have said, out of the herbage of lands, and regularly not out of any inheritances incorporeall, or that lye in grant."

"So as the meaning of Littleton in this particular case is, that the lord may distreine for his rent of common right, that is, by the common law, without any particular reservation or provision of the party."

Page 114a, Section 218:

"Also, if a man seised of certaine land grant, by a deed poll, or by indenture, a yearly rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, etc., with a clause of distresse, etc., then this is a rent charge; and if the grant be without clause of distress, then it is a rent secke. And note, that rent secke *idem est quod redditus siccus;* for that no distresse is incident unto it."

At page 47a, Coke says, referring to leases for term of years:

"First, it appeareth here by Littleton that rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distreine, as Littleton here also saith, and therefore a rent cannot be reserved by a common person out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, privileges, franchises, and the like. But if the lease be made of them by deed for years, it may be good by way of contract to have an action for debt, but distreine the lessor cannot. Neither shall it passe with the grant of the reversion, for that it is no rent incident to the reversion."

It is therefore apparent that rent by the common law was a valuable thing expressly payable *out of the land*, that is to say, because of the holding of the land by the tenant.

Gilbert on Rents, pages 1, 2, 3.
Coke upon Littleton, 142.
Comyns Digest, Title "Rent."
Bacon Abridgment, Title "Rent," Title "Distress."

As a result of this the tenant was not bound to pay rent if he was evicted from the land and this principle is at the basis of the decisions that no claim can be proved in bankruptcy or insolvency for an anticipatory breach of the rent covenant, "since before the day at which rent is covenanted to be paid it is in no sense a debt; it is neither *debitum* nor *solvendum*, for if the lessee is evicted before that day, it never becomes payable."

Deane v. *Caldwell*, 127 Mass. 242.
Slocum v. *Soliday*, 183 Fed. Rep. 410 (C.C.A. 1st).
In re *Roth & Appel*, 181 Fed. Rep. 667 (C.C.A. 2d).

These peculiarities were, however, confined to rent as such. It was always proper to make covenants and obligations for the payment of sums of money arising out of or for the use of land which followed the rules of covenants relating to the "meere personalty" and did not follow the rules relating to rent.

Coke upon Littleton, 47a.
Witton v. *Bye*, Cro. Jac. 486.
Wilston v. *Pilkney*, 1 Vent. 242.
Cartwright v. *Pinkney*, 1 Vent. 272.
Spencers Case, 5 Coke, 15 a.
Anonymous v. *Cooper*, 2 Wilson, 370.
Baynton v. *Bobbet*, 2 Vent. 67.
Newton v. *Weeks*, Aleyn, 79.
Spatchurst v. *Mens*, Aleyn, 57.
Clarke v. *Peppin*, 2 Vent. 97, 99.
Anonymous, Anderson, 26.
Viner's Abridgement, 490.
Anonymous, Noy. 60.
Anonymous, 12 Modern, 73.
Lambert v. *Norris*, 2 M. & W. 333.
Hoby v. *Roebuck*, 7 Taunt. 157.
Pargeter v. *Harris*, 7 Q.B. 708.
Adams v. *Hagger*, L.R. 4 Q.B.D. 480.
Hatherton v. *Bradburne*, 13 Sim. 599.

The case of *Witton* v. *Bye*, Cro. Jac. 486, shows clearly that the diversity between realty and personalty so far at least as the present question is concerned is confined to the difference between *rent* as such and a covenant to pay other sums of money. This difference was often of great importance since distress lay only for *rent*.

In *Witton* v. *Bye*, the action was debt by the plaintiff as administrator of George Witton, alleging that his intestate had been possessed of a term of years and had assigned the lease to the defendant, rendering annually during the term fifty pounds. The defendant pleaded that the plaintiff's intestate had released all actions, debts, duties and demands to which the plaintiff demurred. The Court held that forasmuch as the lessee had assigned over all his term reserving his rent, the "rent" was not attendant on the reversion, but was only due by contract; and this release of all demands discharged this contract, and all demands concerning it.

In the case of *Anonymous* v. *Cooper*, 2 Wilson, 375, the Court says:

> "If a man hath a term for years and grants all his estate of the term rendering certain rent he cannot distrain if the rent be in arrear; this case is like and in point, therefore if the avowant will recover what is owing to him from the plaintiff he must bring his action upon the contract."

So also in the case of *Baynton* v. *Bobbet*, 2 Vent. 67, which was an action for "rent reserved out of a grant of a right in a river," it was held that the plea of eviction on non-enjoinment was not a bar.

In the case of *Newton* v. *Weeks*, Aleyn, 79, which was a case of covenant upon an indenture made by the defendant for a rent charge the defendant pleaded that the plaintiff had nothing in the land at the time of the grant, but that a stranger was seized of it. On demurrer it was adjudged for the plaintiff, "both because the defendant is estopped by the deed" and because "the covenant extends to it as an annuity."

In the case of *Spatchurst* v. *Mens*, Aleyn, 57, the action was debt by administrator for rent reserved upon an assignment for a term of years. It was held that this was a sum in gross and not rent properly, and being a sum in gross no action would lie until the last day of payment had occurred.

In the case of *Clarke* v. *Peppin*, 2 Vent. 97, 99, the plea of *nil habuit in tenementis* was held bad in an action on a "covenant for a sum in gross."

In Viner's Abridgement, 490, occurs the following:

> "Feoffment was on condition that feofee and his heirs shall pay a rent to a stranger and his heirs, this is a good condition, yet such payment is not properly rent, because it issues not out of land, and an assise lies not for it, yet if it be not paid the feoffer shall re-enter, and the feoffee ought to seek the stranger, for the payment is but of a sum in gross."

In the anonymous case reported in Noy. 60, the action was debt reserved upon the lease of a warren of conies. The defendant pleaded that the plaintiff had plowed a field, parcel of the warren, by which the conies had not sufficient pasture. By the Court it was held that "it is no plea for it is not a rent but a seniory in gross, due by reason of the contract by which the entry or user of that part is not any suspension."

In the anonymous case reported in 12 Modern, Judge Holt said:

> "A rent may be reserved on words of covenant, but where there is a rent reserved, and a covenant also for other money in the same deed, debt will not lie for the latter: as if I demise 20 acres, reserving 20 l. a year and further agree with him in the same deed, that for as many acres as he shall plow up he shall give 10s. more for each per annum, this last sum is no rent, and an action of debt will not lie for it."

In *Lambert* v. *Norris*, 2 M. & W. 333, the landlord who had demised certain premises for twenty-one years by deed at the rent of 230 pounds agreed to enlarge the buildings, the lessees agreeing to 10% additional on the outlay. The buildings were accordingly built and the lessees subsequently became bankrupt and their assignees took possession of the premises.

It was held in an action for use and occupation brought against the assignees that the agreement for the additional 10% was a collateral agreement, and not a contract running with the land upon which the assignees were liable.

Lord Abinger said: "The action ought to be brought upon the contract against the original party to the contract."

In *Pargeter* v. *Harris*, 7 Q.B. 708, the action was covenant upon an indenture of lease for rent. It appeared by the terms of the indenture that lessor was the owner merely of an

equity of redemption, and it was, therefore, conceded that strict common law rent could not be reserved. The defendant pleaded that the plaintiffs, although the successors to the right of action under the covenant, were not the owners of the reversion, which had been assigned away by them.

The Court held that plea was bad, for the reason that this reservation, although called rent, was not rent, but was merely a sum in gross, and that the right to enforce its payment, therefore, followed the rules in actions upon covenants.

It is clear, therefore, that the rules applicable to rent were at common law, and must to-day be confined to these things which were strictly rent, and it is likewise clear that the present claim is not a claim for rent.

The first essential of rent is that it shall be a payment out of the land.

Coke upon Littleton, 47a (cited *supra*).

Yet by the very terms of the covenant here in question, the payment was to be made only in the event that the lease had been terminated.

See cases cited *supra*, and the following:

Adams v. *Hagger*, 4 Q.B.D. 480.
Hatherton v. *Bradburne*, 13 Sim. 599.
Cox v. *Harper*, (1910) 1 Chancery, 480.

It is submitted as clear, therefore, upon a consideration of the covenant under which proof is sought, that if the present claim is not to be barred because contingent at the date of the receivership, it cannot now be barred, for it was at the date of its presentation for allowance a certain claim for compensatory damages, and not a claim for rent. It was a covenant for the payment of a "sum in gross."

The fact that the present claim is one arising under a contract, and is a claim for damages and not a claim for rent is also illustrated by the decision of the Circuit Court of Appeals for the Second Circuit in the case of in re *Mullings Clothing Co.*, 238 Federal, 58, already cited above.

That Court says with reference to a similar claim asserted by a landlord: "Is the claim which the landlord is seeking to assert one which arises upon a contract? We have no doubt that it is. . . . We do not overlook the doctrine that a covenant to pay rent creates no debt until the time stipulated for the payment

arrives. . . . But that doctrine is not at all relevant to the facts of this case. This is an action for breach of contract, occasioned by the steps taken to wind up and dissolve a corporation, which breach occurred prior to the bankruptcy. . . ."

1. IT IS NOT A CLAIM FOR THE PAYMENT OF "ACCELERATED" FUTURE RENT.

Objection was urged to the present claim on the ground that the clause in question provides for the "acceleration" of future rent.

It is apparent, of course, as has been stated above, that the present claim is not for rent, but for damages under the agreement.

In re *Roth & Appel*, 181 Fed. 667 (C.C.A. 2d).
Woodbury v. *Sparrell Print*, 198 Mass. 1.
Hall v. *Gould*, 13 N.Y. 127.
Grommes v. *St. Paul Trust Co.*, 147 Ill. 634.

The Filene Company is seeking not the rent and the premises too, but having retaken the premises it asks only to be compensated for actual loss which it is to suffer in a decreased rental.

There is no analogy between the present claim and one arising under a provision that upon bankruptcy a year's rent or rent for some other period which was otherwise not due should at once become due, although there are decisions that even such a form of agreement is unobjectionable and gives rise to a provable claim in bankruptcy.

In re *Pittsburg Drug Co.*, 164 Fed. 482.

In the present case the obligation is not only not accelerated by bankruptcy, but does not even arise *because* of bankruptcy or insolvency. It is conditioned upon a breach of a lease, arises as compensation for that breach, and is limited in its extent by the actual damage caused by the breach.

There is no more "acceleration" in such a method of determining damages than in the method which the law itself adopts in any case of the recovery of present damages for the failure to perform acts which extend into the future. All that is done in any of these cases that in any way concerns dealing in the future is the taking of a future performance as the measure of what the plaintiff would be entitled to if the contract were carried out.

The common proof in bankruptcy for sums of money due in the future is a daily example of what on this theory might be

called "acceleration." So is the claim of an employee who has been discharged before the end of the contract period, or the claim of an unpaid seller of goods which are to be delivered in instalments in the future. No one has suggested that the claims of any of these persons are not allowable even in bankruptcy because they get present damages for a present default of an obligation which, if performed, would have extended into the future.

Central Trust Co. v. *Chicago Auditorium Ass.*, 240 U.S. 581.

Ex parte Pollard, F.C. 11, 252 (D.C. Dist. of Mass.).

In re *Silverman*, 101 Fed. 219 (D.C. West. Dist. Mo.).

In re *Saxton Furnace Co.*, 142 Fed. 293 (D.C. East. Dist. Penn.).

In re *Duquesne Incandescent Light Co.*, 176 Fed. 785 (D.C. West. Dist. Penn.).

See *Rochm* v. *Horst*, 178 U.S. 1 (*semble*).

Pratt v. *Auto Spring Repairer Co.*, 196 Fed. 495 (C.C.A. 1st), (*semble*).

The decision of this Court in the case of *Central Trust Co.* v. *Chicago Auditorium*, 240 U.S. 581, clearly shows the fallacy of this objection.

In that case the situation was identical with the one in the case at bar except that the matter involved was a lease of a personal privilege instead of a lease of real estate, so that the doctrine of anticipatory breach was sufficient to get over the objection of contingency for the purpose of permitting the proof of the claim in bankruptcy. There, nevertheless, still remained the question of the equity of the claim and upon this point the decision is a direct authority in favor of the allowance of the claim of the Filene Company.

In *Central Trust Co.* v. *Chicago Auditorium Association*, the bankrupt under written agreement with the owner of the Auditorium Hotel in the City of Chicago was granted the sole and exclusive right to transfer baggage and passengers to and from the hotel for a term of five years and to furnish livery to its guests and patrons. For these privileges the bankrupt agreed to pay the sum of $20,000 in monthly instalments of $350 each. The contract authorized the hotel in the event of default by the bankrupt in the payment of any instalment of money due or in the performance of any other covenant to terminate the privileges at its option without releasing the bankrupt from liability on its covenant for the payment of money.

Up to the time of bankruptcy the contract remained in force and neither party had violated any of its covenants The trustee did not elect to assume its performance and the hotel entered into a contract with other parties for the performance of the services and obtained therefor a less sum monthly as compensation than that contracted for.

This Court held the claim provable.

The fact of the matter is that the Court below has misapplied the word "acceleration." A provision for "acceleration" properly defined in the sense in which the courts have generally used that term in ruling against the enforceability of such a provision is a clause which causes the obligation to arise upon a given event which at the same time cancels the consideration for that obligation. This objection is one arising out of general principles and is not peculiar to the law of landlord and tenant.

In re *Merwin & Willoughby Co.*, 206 Fed. 116 (D. Ct. N.D. N.Y.).

Lamson Consolidated Store Service Co. v. *Bowland*, 114 Fed. 639 (C.C.A. 6th).

Wilson v. *Penn. Trust Co.*, 114 Fed. 742 (C.C.A. 3d).

McCall Co. v. *Deuchler*, 174 Fed. 133 (C.C.A. 8th).

In re *Merwin & Willoughby Co.*, 206 Fed. 116, the Court says:

> "It is plain enough that parties to a contract for the loan of money secured by a note or mortgage may provide for the acceleration of payment of the principal in case of default in the payment of interest, or of instalments of principal. In such case the consideration has been fully furnished, and the only question is time of payment. But may the lessor of personal property or of real estate contract to rent, say for 10 years, the rent payable in annual instalments of say $200 per annum, and provide that in case of non-payment of rent when due the rent for 10 years, or $2,000, shall become immediately due and payable, and that the lessor may also at once re-enter and take possession of the leased land or property as his own, and have the use and occupation of such premises or property, and also collect the rent for the full period, and then in case of default in payment of the first year's rent and on the bankruptcy of the lessee, not only take and retain possession of

> the property or premises, but collect the rent for the entire time?"

and in *Lamson Consolidated Store Service Co.* v. *Bowland*, 114 Fed. 639, the Court says:

> "Liability under such circumstances for future rent would be in the nature of a penalty, and the covenant by which the lessor may have both the use of the thing rented, and the compensation which the lessor was to pay for its use, must be so specific as that no other reasonable interpretation can be placed upon it."

As applied by the District Judge in his decision of the present case, however (and adopted by the majority of the Court of Appeals), the term "acceleration" includes any case in which there is *present* compensation for a default in an obligation the complete performance of which extends into the *future*, even though the payment sought to be enforced is only just compensation for a damage presently and actually suffered and even though the tenant has already had all the consideration of the contract or at least all of the consideration for which payment is asked. Logically applied the ruling of the District Judge would render unprovable a claim under the common provision in instalment notes which makes all instalments due upon default of any one. Such provisions have, however, been regularly enforced in equity and recognized in bankruptcy.

Olcutt v. *Bynum*, 17 Wall. 44, 62.
Merwin & Willoughby Co., 206 Fed. 116.
Ruggles v. *So. Minn. R.R. Co.*, F.C. 12,121, Circuit Ct., Dist. of Minn.
Gregory v. *Marks*, F.C. 5,802 (C.C.N.D., Ill.).
Protector Loan Co. v. *Grice*, 5 Q.B.D. 592.
Sterne v. *Beck*, 1 D.G.J. & S. 595.
Wallingford v. *Mutual Society*, L.R. 5 Ap. Cases, 685.
Morling v. *Bronson*, 37 Nebraska, 608.
Spring v. *Fiske*, 21 N.J. Eq. 175.
Harris v. *Powers*, 129 Ga. 74.
Robinson v. *Loomis*, 51 Penn. 78.
Platt Barber Co. v. *Johnson-Peterson*, 168 Penn. 47.
Andrews v. *Jones*, 3 Blackf. (Ind.) 440.
Mulcahey v. *Strauss*, 151 Ill. 70.
Cassidy v. *Caton*, 47 Iowa, 22.

The Filene Company does not seek to keep its premises and get paid for them too, — which would be acceleration. On the contrary, having had its premises returned to it, and payment for the term refused, it seeks to recover for the difference between the promised payment and what it can dispose of the term for, — its actual damages.

2. IT IS A CLAIM FOR THE PAYMENT OF COMPENSATORY DAMAGES.

It may be conceded at the outset that so far as after accruing rent is concerned no more can be recovered upon a covenant to pay *rent* than upon reservation of rent itself. When, however, the covenant is one to pay not rent but damages, the situation is entirely different. It then follows the rules applicable to any covenant for the payment of sums "in gross."

Accordingly when the liability for breach of an agreement to occupy the premises and pay rent therefor is divorced from the technical rules relating to the payment of rent, as upon the breach of an agreement to take a lease, it is well settled that the measure of the lessor's loss and of his recovery is the difference between the rental value of the premises and the rent reserved in the lease.

Re Mullings Clothing Co., 238 Fed. 58 (C.C.A. 2d).
Addiey v. *Tull*, 187 Fed. 101 (C.C.A. 2d).
Oldershaw v. *Holt*, 12 A. & E. 590.
Marshall v. *Mackintosh*, 78 L.T.R. 750.
Segal v. *Ensler*, 37 N.Y. Sup. 694.
James v. *Kibler's Administrator*, 94 Va. 165.
Post v. *Davis*, 7 Kan. App. 217.
Dulin v. *Knechtel*, 51 S.W. 350 (Texas Civil Appeals).
Bradbury v. *Higginson*, 123 Pac. 797 (Supreme Ct. Cal.).
Oldfield v. *Angeles Brewing & Malting Co.*, 137 Pac. 469 (Supreme Ct. Wash.).
Resser v. *Corwin*, 72 Ill. App. 625.

The measure of the loss is no different when the breach accrues after the lease is in existence, although the right to recover it may depend upon proper provisions in the lease.

Minneapolis Baseball Co. v. *City Bank*, 74 Minn. 98.
Oldershaw v. *Holt*, 12 A.E. 590.

A number of cases have arisen outside of bankruptcy proceedings which make it clear that the claim is a pure claim for compensation about which there is no element of injustice or impropriety.

These cases have generally arisen under covenants of indemnity, that is to say, agreements by the tenant that he would, despite the entry and termination of the lease by the landlord, indemnify the landlord for any loss of rent which the landlord might suffer during the remainder of the period covered by the original term.

Such a covenant was considered and treated as proper and enforceable by this Court in the case of *International Trust Company* v. *Weeks*, 203 U.S. 364.

Other decisions to the same effect have been rendered by the Supreme Court of Massachusetts:

Way v. *Reed*, 6 Allen, 364.
Woodbury v. *Sparrell Print*, 187 Mass. 426.
Edmands v. *Rust & Richardson Drug Co.*, 191 Mass. 123.

And by the Supreme Courts of other states:

Hall v. *Gould*, 13 N.Y. 127.
Heims Brewing Co. v. *Flannery*, 137 Ill. 309.
Grommes v. *St. Paul Trust Co.*, 147 Ill. 634.

In the case of *Way* v. *Reed*, 6 Allen, 364, decided by the Supreme Court of Massachusetts, the lease contained a clause that upon entry for breach the lessor might at his discretion relet the premises at the risk of the lessee who should for the residue of the said term remain responsible for the rent and should be credited with such sums only as should be by the lessor actually realized.

The lessor entered and terminated the lease and this was a suit for a deficit. The Supreme Court said:

> "It is further objected by the tenant that he cannot be held liable for the rent of the premises after they were taken possession of by the lessor on the 8th of May, 1861. The answer to this objection is that such right to re-enter the premises and to re-let the same at the risk of the lessees was expressly reserved by the lease."

To the same effect is the decision of *Hall* v. *Gould*, 13 N.Y. 127, in which the Court said among other things:

> "By the entry for condition broken the estate of the lessee was at an end and the lessor was in of his former estate. Rent as such could therefore no longer accrue to

the lessor from the lessee. His liability rested only upon his covenant looking to this very event."

In the case of *Heims Brewing Co.* v. *Flannery*, 137 Ill. 309, the lessor had leased premises for use as a saloon to a tenant for three thousand dollars to be paid at the rate of fifty dollars a month, and had agreed not to engage in the liquor business in the meantime.

The lease was to terminate at the lessor's option on a default in payment which continued for ten months. Such a default having accrued and lessor having entered, it was held that he might recover the whole three thousand dollars, the Court saying:

> "The consideration to be paid for all these various concessions made by the plaintiff was three thousand dollars payable in instalments of fifty dollars at the end of each month.
>
> This compensation was agreed to be paid not merely for rent for premises demised, but as consideration for all stipulations and agreements on the part of the plaintiffs contained in the contract. It was merely stipulated that a termination of the demise for non-payment should not affect the defendant's liability to pay the residue. . . . This is a valid contract which violates no principle of law and which the parties were clearly competent to make, and no reason is apparent why it should not be enforced."

The covenant in the present case goes no further than a mere covenant for indemnity, except that it provides for the present recovery of the present difference between the present rental value and the sum of the payments provided for in the lease, whereas under a mere covenant of indemnity for loss of rent no cause of action can accrue until the time for the payment of the rent has arrived.

The fact that no action for recovery under a contract of mere indemnity can accrue until the rent itself accrues is the basis of the decisions denying the proof of claims under such covenants of indemnity in bankruptcy,

See in re *Roth & Appel*, 181 Fed. 667 (C.C.A. 2d),

and, as has been pointed out above, was the basis of the remarks of the Circuit Court of Appeals for the Second Circuit in the New York City Railway Company case, referred to above.

The present covenant, however, as has already been stated, is a covenant for payment of the damages caused by the present injury, and has none of the characteristics of a covenant of indemnity. It is an expression in language of the very thing provided for by the present English Bankruptcy Act.

The English Bankruptcy Act provides that upon a disclaimer of a lease by a trustee in bankruptcy, the landlord may prove as creditor for his "injury." (See *e.g.*, 46 and 47 Vict. Chapter 52, Section 55, Clause 7.)

This section was construed by the English Court of Appeals in

Ex parte *Llynvi Coal & Iron Co.*, in re *Hide*, Law Reports, 7 Ch. Ap. 28.

In that case there had been a lease for ten years. Bankruptcy of the lessee occurred after the first year. The trustee disclaimed the lease.

James, L.J., said in delivering the opinion:

> "I am satisfied that the injury referred to in this section means legal wrong that is done him (the landlord). He is deprived of a certain contract under which he was to recover a certain sum of money, and he is to prove against the estate for that which he would have had the right to recover or to sue for if he had not been deprived of that right by bankruptcy.
>
> A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at five hundred pounds a year and who is then suddenly deprived of his employment; in such a case he would be entitled to prove for five hundred pounds a year minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for five hundred pounds a year to be paid to him for the use of land is entitled to claim five hundred pounds a year, minus what he can get for the land from another tenant. It seems to me that that is the common sense of the Act of Parliament, and that there is nothing to compel the Court to put any construction upon it inconsistent with the common-sense view."

B. IT IS NOT A CLAIM FOR DAMAGES CAUSED BY THE ACT OF THE CLAIMANT.

Much stress was laid by the District Court and the Circuit Court of Appeals upon the argument that the damages, if any, suffered by the Filene Company were caused by its own act.

But the contrary is true as a matter of fact. To say that the Filene Company might have elected to allow the lease to continue in the name of a defunct corporation which had been stripped of all its assets, which had neither ability nor means to pay the rent, and that termination of the lease by the Filene Company and the consequent damages was a result of its own wilful conduct is the barest fiction. Except for the question of the character of the damages which accrue, the question is no different in this case than in any case of anticipatory breach of an agreement caused by the lessee's insolvency and bankruptcy. If the damages which arose in the present case can be said to be the result of the act of the Filene Company, then the damages which accrued to the Chicago Auditorium when it terminated the livery privilege of the bankrupt liveryman were the result of the act of the Auditorium and ought not to have been permitted proof in bankruptcy.

See *Central Trust Co.* v. *Chicago Auditorium*, 240 U.S. 581.

Similarly the damages which accrued to the express company in the New York City Railway receivership were the result of its own act.

Penn. Steel Co. v. *N.Y. City Railway Co.*, 198 Fed. 721.

If the act of the receiver or trustee in electing not to affirm a contract of employment or a contract for livery service can be said to relate back to the time of bankruptcy so as to cause a breach to take place at that time, and if the act of the obligee in treating the contract as broken may similarly be said to relate back to the commencement of the insolvency or bankruptcy proceedings so as to cause the breach to be the result of the act of the insolvent or bankrupt, there seems no reason why a similar construction cannot be applied in the present case.

That a lessor may treat a repudiation by the lessee as a breach of the covenants of the lease is clear.

Re Mullings Clothing Co., 238 Fed. 58 (C.C.A. 2d).

With all due respect to the learned Judges of the District Court and of the Circuit Court of Appeals, it is submitted that this contention is without any merit whatsoever.

C. THE PRESENT CLAIM IS NOT A CLAIM FOR A PENALTY.

The argument that the claim of the Filene Company is for a pure penalty is without merit. The claim is clearly one only to obtain compensation for pecuniary loss — *i.e.*, to put the plaintiff in the same position "so far as money can do it as he would have been if the contract had been performed."

Sedgewick, Damages, Sect. 30.

A penalty is, of course, the payment of a sum having "no necessary or natural connection with the measure or degree of injury which may result from a breach of contract or from an imperfect performance."

Van Buren v. *Digges*, 11 How. 461, 477.
Sun Printing & Pub. Assn. v. *Moore*, 183 U.S. 642.

It is impossible to contend that an agreement to make the lessor whole for the actual damages which it is universally admitted the lessor has suffered has no "necessary or natural connection with the measure or degree of injury" which has resulted from the breach.

Neither is there any element of forfeiture in this claim. Some courts have objected, and perhaps rightly, as stated above, to the enforcement of provisions in contracts which provide that upon default the obligee shall be entitled to the whole consideration at once and shall also be entitled to re-take that for which the consideration was promised.

This is, however, distinctly not such a case. The present case is rather analogous to that of one who has contracted to sell goods and finds the contract broken by the prospective buyer before the goods have been delivered. The claimant in such a case of course has the goods in his hands, but he has lost the benefit of the bargain. It is for this loss that he claims. All courts unite in granting to such a claimant the right of recovery. As was said by the Supreme Court in the case of *Philadelphia, Wilmington & Baltimore R.R. Co.* v. *Howard*, 13 How. 307, at 344, in which there was a contract to build a railroad, which was broken by the railroad before work was done by the plaintiff:

> "It is insisted that only actual damages, and not profits, were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no

means follows that profits are not to be allowed, understanding, as we must, the term 'profits' in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*

And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice."

The Filene Company, similarly, is claiming for the value of the loss of the bargain which it made with the Butler Company. Just as the measure of the loss and recovery of the prospective seller of goods is measured by the difference between the market value of the goods and the contract price, so the Filene Company's claim is for the difference between the market value of the occupation for the term and the leasing price. In each case the calculation of damages takes the present market value of the property as the measure, although where the performance is to extend over a period of time the recovery upon the basis of present market value may be greater or less than the actual loss, and although, further, if the trial takes place after the time for performance, the actual facts may be shown as determining the market value.

Brown v. *Muller*, L.R. 7 Exch. 319.
Roper v. *Johnson*, L.R. 8 C.P. 167.

Much attention was addressed at the argument below to the $20,000 clause in the lease. As appears from the evidence which was offered, this was a "bonus" for the lease. It was the price paid for the privilege of being permitted to enter into the relation of tenant, not the price for the right to continue as one. This aspect of the $20,000 clause will be discussed further in a subsequent portion of this brief. It is to be noted here, however, that all the arguments of the receivers aimed at the $20,000 clause as a penalty or a provision for a forfeiture have no application to

any case except one in which the claimant might be seeking, as is not the case here, to prove for the sum of $20,000 per year, although its actual damages were less. In view of the "bonus" character of this payment, even such a claim might be defended.

Thus, in *Dutton* v. *Christie*, 115 Pac. 856 (Wash.), a lease was made in consideration of the covenants of the lessee and of $1,500 paid to the lessor, and provided that the payment should be credited on the rent for the last two months of the term upon the lessee performing all of the terms and conditions of the contract, but otherwise upon the termination of the lease by reason of the failure of the lessee to perform, the payment should belong to the lessor as part of the consideration for the lease. The Court held that the $1,500 was applicable to the rent only in the event of a contingency which had not occurred, and that the $1,500 was not a payment in the nature of a penalty, but was a payment for which the lease was a full consideration, and that where the lessee voluntarily abandoned the premises he could not recover any part of the $1,500.

It is enough for the present case to point out, however, what cannot be denied, that the claim of the Filene Company for compensation for its actual loss is not affected one way or the other by regarding the $20,000 clause as a separate item, absolutely payable in case of loss, or merely as an element in determining the payments reserved under the lease from which the rental value is to be subtracted, for, as has been shown above, this actual loss is greater than $20,000 per year.

D. THE PRESENT CLAIM DOES NOT SEEK TO ENFORCE AN INEQUITABLE OR ILLEGAL AGREEMENT.

If the entry by the Filene Company and the termination of the Butler lease had occurred prior to the appointment of the receivers, it seems to be conceded that there would be no objection to the proof of the claim for damages in these proceedings.

Re Mullings Clothing Co., 238 Fed. 58 (C.C.A. 2d).

It is difficult to see why there is any equitable reason for distinguishing as to the meritoriousness of the claim between a claim which arose before the appointment of the receivers or simultaneously with the appointment, or one which arose subsequently thereto.

The receivers argued below that the present claim was an illegal one because it was based upon an agreement which sought to evade the provisions of the bankruptcy law. Waiving, for the purposes of this argument, the fact that this was not a proceeding

in bankruptcy, the position of the receivers seems merely to be that since the courts generally have held that claims for future rent are not provable in bankruptcy, it therefore follows that any agreement between landlord and tenant that the tenant shall pay the landlord the damages caused to the landlord by a breach of the lease fixed in a definite and ascertainable manner is illegal and unenforceable as against other creditors.

The present agreement cannot be attacked as an agreement which provides that property which was the debtor's prior to the bankruptcy shall become the property of some one else upon bankruptcy, nor is it an agreement which provides that a debt shall become due by reason of or because of bankruptcy, nor is the debt one which has no relation to the actual injury caused.

The Supreme Court of Maryland did not consider that the landlord was enforcing an inequitable or illegal claim or one caused by his own acts in *Woodland* v. *Wise*, 112 Maryland, 35. Nor did the New York Court of Appeals in *Peoples* v. *St. Nicholas Bank*, 151 N.Y. 592. Nor did the Supreme Court of Minnesota in *Kalkhoff* v. *Nelson*, 60 Minn. 284. Nor did the Supreme Court of Michigan in *McGraw* v. *Union Trust Company*, 135 Mich. 609. Nor the Supreme Court of Illinois in *Smith* v. *Goodman*, 149 Ill. 75. Nor the Supreme Court of Ohio in *Wilder* v. *McDonald*, 63 Oh. St. 383. Nor the Supreme Court of Pennsylvania in *Reading Iron Works*, 150 Pa. 369. Nor the Circuit Court of Appeals for the Second Circuit in *Re Mullings Clothing Co.*, 238 Fed. 58.

In each of these cases the Court allowed the landlords to recover in equitable proceedings like these on a parity with other creditors for damages measured by the difference between the rental value of the premises and the rent reserved in the lease and in a number of the cases without attention to any special provision therefor in the lease.

Finally, attention should be called again to the English case of

Ex parte Llynvi Coal & Iron Co., in re Hide, Law Reports, 7 Ch. Ap. 28 (referred to above),

which states the English law upon this very question and shows the English view of this agreement.

The language of Lord Justice James will bear repetition:

> "I am satisfied that the injury referred to in this action means legal wrong that is done him (the landlord). He is deprived of a certain contract under which he was to recover a certain sum of money, and he is to prove against the

estate for that which he would have had the right to recover or to sue for if he had not been deprived of that right by bankruptcy.

A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at five hundred pounds a year and who is then suddenly deprived of his employment; in such a case he would be entitled to prove for five hundred pounds a year minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for five hundred pounds a year to be paid to him for the use of land is entitled to claim five hundred pounds a year, minus what he can get for the land from another tenant. It seems to me that that is the common sense of the Act of Parliament, and that there is nothing to compel the Court to put any construction upon it inconsistent with the common-sense view."

See accord. *ex parte Blake*, 11 Ch. Div. 572.

The provision of the lease that "the amounts due the lessor from the lessee under the preceding clause may be proven in bankruptcy, insolvency or receivership proceedings, or against any assignee or trustee for the benefit of creditors" was clearly not inserted with any idea of causing the claim by such an agreement to be provable if upon a correct application of legal and equitable principles the claim was not otherwise of a provable nature. It must have been obvious to the parties in drafting the lease that they could not thus mould the law.

The reason for the insertion of this clause lies in another direction, viz.: it was to guard against the argument often made, and sometimes sanctioned by the courts, that it was not contemplated that the claimant should have and the defendant pay damages in the events which have occurred.

For example, in the case of *Ely* v. *Van Kannel Revolving Door Co.*, 184 Fed. 459 (C.C., E.D. N.Y.), which was a claim to prove in a receivership for damages under an employment contract, the Court says: "The New York rule would seem to be that any legal termination of business (especially under court order) which could have been reasonably in the minds of the parties as a possible intervention of some *vis major* could not be relied upon as a breach of contract in case it did occur."

The contract clearly shows that the clause in question was inserted to prevent a similar argument being made here, viz., that it was not clear that it "could have been reasonably in the minds of the contracting parties" that the events which have occurred could be relied upon as a breach of contract entitling the lessor to damages. It is not claimed that the clause has any other efficacy.

It was also said by the Circuit Court of Appeals that the claim of the Filene Company ought not to be permitted to be proved because other creditors had a right to rely upon the fact that the claim was not provable. This is clearly an argument in a circle, for it is obvious that other creditors had no right to assume that the claim was not provable unless in fact it was not provable, and to argue as did the Circuit Court of Appeals is to assume the very proposition to be proved.

III.

THE CLAIM IN QUESTION WAS IN PART AN ACCRUED CLAIM ON THE DATE OF THE RECEIVERSHIP AND THE COURT SHOULD HAVE ADMITTED THE EXCLUDED EVIDENCE.

As has already been pointed out, it is not necessary to rely upon the $20,000 clause as a separate item in the calculation of damages. If, however, the provisions of the lease with reference to this payment are analyzed it will be seen that they provide an alternative basis upon which at least a large part of the claim of the Filene Company would in any event be provable as a claim for an accrued sum in gross, *i.e.*, a bonus.

A reading of the lease shows that by its terms the lessee was bound to pay a sum of $20,000 per year as compensation for the privilege of having been given the right to occupy the premises fitted up and ready for business, regardless of the continuance of the term for which it was prescribed, viz.: a bonus payment.

The $20,000 payment is referred to in the following places in the lease (references are to pages of the Record):

> Page 29, paragraph 2: "The lessor in consideration of the covenant of the lessee to pay a sum equal to $20,000 per year for each year from the beginning of the term to February 27, 1921, and the same rate for a fraction of a year, and of the other covenants herein contained by the les-

see to be performed, hereby demises and leases unto the lessee the following premises . . ."

Page 32, paragraph 3: "Yielding and paying . . . as rental a sum equal to the aggregate rentals payable from time to time under the several leases . . . together with a further sum of $20,000 yearly payable in equal monthly instalments."

Page 33, paragraph 2: "The lessor agrees upon the written request of the lessee and of the over-lessors . . . to the lessee so to do and upon payment of a sum equal to $20,000 per year for each year of the term hereof unexpired (less a discount at the rate of five per cent. (5%) per annum on payment so anticipated), with one day added and at the same" rate for a fractional part of a year to cancel and terminate the over-leases.

Page 35, paragraph 2: "Provided nevertheless that in case the premises are damaged or destroyed by fire or other unavoidable casualty, or by action of the public authorities, or a portion of the premises is taken for a public use, the rent and other payments to be made by the lessee hereunder, except said payment of $20,000 per year shall be abated in proportion to the injury."

Paragraph 3: "In case for any cause the over-lease of any part of the demisee premises is terminated, this lease shall nevertheless continue as to the balance of the demised premises, and said payment of $20,000 per year shall continue without any abatement in whole or in part by reason of partial or complete damage, destruction or taking by eminent domain or termination wholly or in part of the over-lease."

Page 37, paragraph 1: On termination of the lease for default "the lessee will pay to the lessor upon demand a sum equal to $20,000 per year and at the same rate for a fractional part of a year for so much of the period up to February 27, 1921, as remains unexpired, with one day added (less the five per cent. (5%) discount as aforesaid)."

Furthermore, although the obligation to pay the $20,000 per year extends for a term not expiring till February 27, 1921, the over-leases of part of the premises (Stowell) expired on December 31, 1917, and of another part (Dexter) on December 31, 1920.

It is obvious from these clauses that this sum of money was a payment, not as rent to accrue from time to time, but a payment

the obligation for which accrued upon the execution of the agreement, and which was in consideration of its execution.

If it is not clear upon the face of the instrument that the $20,000 per year payment was a mere bonus, payable and due at once upon the execution of the lease, that fact clearly appears from the prior negotiations of the parties which terminated in the execution of the lease, and from the surrounding circumstances. That this evidence is admissible is settled by the decision of the Supreme Court in the case of *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105. That was a case in which there was a contract between the government and the Bethlehem Steel Company for certain work, with a provision that the Steel Company if guilty of delay was to pay so much per diem as "penalty." Mr. Justice Peckham, in delivering the opinion of the Court, said:

> "It is objected on the part of the company that as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to, and it is insisted that under that rule the various letters passing between the parties prior to the execution of the contract are not admissible.
>
> The rule that prior negotiations are merged in the contract is general in its nature, and we think does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction in the discretion of the Chief of Ordnance of thirty-five dollars per day from the price to be paid for each day of delay in the delivery of each gun carriage respectively, taken in connection with the subject matter of the contract leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the

case, and to the prior negotiations, for the purpose of determining the correct construction of the language of the contract. *Simpson* v. *U.S.*, 199 U.S. 397–399. In *Brawley* v. *U.S.*, 96 U.S. 168–173, the Court says: 'Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject matter of a contract and the sense in which the parties may have used particular terms.'"

See also *Sun Printing & Pub. Ass'n* v. *Moore*, 183 U.S. 642–673.

Garfield Coal Co. v. *Penn. Coal Co.*, 199 Mass. 22, 37.

Putnam-Hooker Co. v. *Hewins*, 204 Mass. 426.

York v. *York Rys. Co.*, 229 Penn. 236.

In the present case the facts relevant to this construction of the $20,000 clause, apart from the terms of the contract itself, are: 1, the circumstances of the parties as found by the Master; and 2, the negotiations between them which led to the determination of this amount and its inclusion in the lease.

It appears that the Wm. Filene's Sons Company was, prior to the execution of the lease to the Butler Company, in occupation of five buildings which it had connected together in such a way as to make them into one single department store; that these buildings were held under separate leases which had been acquired by the Filene Company or its predecessors at different times; and that these premises were fitted up by it for use as a department store (Record, page 61). The evidence as to the prior dealings between the parties leading to the $20,000 clause as reported by the Master is as follows:

Before the execution of the lease to the Butler Company, and as a part of the negotiations leading up to it, the president of the Butler Company sent to the president of the Filene Company a letter, introduced in evidence as Exhibit 31, which reads as follows (Record, page 52):

"BOSTON, MASS., April 12th, 1912.

E. A. FILENE, ESQ.,
Boston, Mass.,

My Dear Mr. Filene:

After carefully considering your last proposition, . . . I . . . make the following proposition.

For your assignment of the leases described in the Eldridge Circular, I will pay you twenty thousand dollars

($20,000) a year bonus on the terms stated in the Eldridge Circular. In other words, I will accept the proposition in the Eldridge circular with one modification, that the bonus instead of being three hundred and forty thousand dollars ($340,000) for the term, shall be twenty thousand (20,000) a year.

. . . . . .

Yours,

WE.B."

The "Eldridge" circular referred to in this letter was introduced in evidence as Exhibit 32 (Record, page 53). It was sent out by the agent of the Filene Company in charge of letting the property to prospective tenants at the time, and read as follows:

"NOVEMBER 3, 1911.

DEAR SIR:

We beg to acknowledge your favor of November 2d. The following are the facts in regard to the present FILENE STORE."

(Here follow several paragraphs containing a description of the premises and a statement as to the terms of the lease and the amount of the Filene Company business done on the site.)

"For the sum of $340,000 the William Filene's Sons Company will assign their lease of the above-described premises, together with all the rights and options contained therein, including tunnel entrance rights, and the right to have a new building erected on about one-half of the property, at a moderate increase in rental; the right to buy at par all of the Copenhagen Trust Stock (amounting to about $450,000), which owns the building next to the corner — practically controlling the two adjoining buildings; and all the rights and title to the building improvements and equipment which they have installed in the premises, including electric lighting plant and all accessories, and a large amount of fixtures, consisting of: . . . and such other fixtures and furnishings as may be agreed upon in the negotiations.

Very truly yours,

(Signed) EDWARD H. ELDREDGE & CO."

After the letter from the Butler Company to the Filene Company, Exhibit 31, an agreement was made between the Filene Company and the Butler Company, marked Exhibit 33 (Record, page 55), whereby the Filene Company agreed to sublet the properties mentioned, and the Butler Company agreed to take such a sub-lease. The material provision of this agreement was that:

> "The sub-lease or assignment of leases . . . shall provide for the . . . payment . . . of the rent and other payments by said leases required to be made to the lessors, and shall provide for the payment to Filene's, in addition to all rentals and other payments called for by said leases, of Twenty thousand (20,000) dollars per year up to February 28, 1921, in monthly instalments of Sixteen hundred sixty-six and 67/100 (1666.67) dollars per month beginning whenever possession of the premises is delivered up, and at the same rate for any fraction of a month."

The time for performing this agreement was extended by mutual consent, and on May 29, 1912, the lease, Exhibit 1, was executed in performance of the terms of the agreement.

It is obvious from this evidence that what happened was that Filene's asked a certain sum of money, payable in advance, for the privilege of taking over the buildings formerly occupied by them; that Butler, acting for the Butler Company, was willing to pay a smaller sum, and also desired that its payment be deferred and paid in equal monthly instalments. Butler's proposition was accepted, and the lease drafted accordingly, and it will be noted that in drafting the lease the draftsman was careful to divorce the $20,000 from the rent so that it should remain payable regardless of the damage or destruction by fire of any part or the whole of the premises, or the taking of the whole or any part of the premises by act of public authorities, although the rents to the over-lessors would be proportionately abated by such a contingency. Furthermore, it is provided that in case the over-lease of any part of the demised premises should be terminated for any cause, the $20,000 payment should, nevertheless, continue without any abatement. The lease also contained a provision whereby Butler might, with the consent of the over-lessors, terminate the relations between the over-lessors and Filene's; but in that event also the $20,000 payment was, nevertheless, to be made; and, as has been pointed out, the obligation to pay the $20,000 per year extended for a term beyond that of the over-leases of part of the premises.

A recent English case is very similar in its facts to the present case in this respect and illustrates the bonus character of this payment of $20,000 per year.

Cox v. *Harper*, (1910) 1 Chancery, 480.

In *Cox* v. *Harper*, (1910) 1 Chancery, 480, there was a lease of a public house upon a yearly tenancy with the following language: "at the rent of 150 l. a year from the said premises and the additional yearly sum of 1250 l. in lieu of premium for the goodwill of the business and for the use of the fixtures and fittings upon the premises, such several rents or yearly sums to be paid weekly."

Upon default by the tenant the question was whether the landlord's right of distress was limited to the 120 l. per year or whether it extended to the additional sum of 1250 l.

The Court of Appeals held that the additional sum of 1250 l. per year was not rent, but a mere bonus.

To the same effect is the case of *Smith* v. *Mappleback*, 1 Term. Ry. 441.

The situation is exactly the same as if the Butler Company had, in consideration of the execution of the lease, given to the Wm. Filene's Sons Company its note, payable in instalments of $1,666.67 per month up to February 28, 1921, with a proviso that in the event of the breach of any of the terms of the lease the whole of the principal of the note should become immediately due and payable.

As has been pointed out above, notes or agreements of this kind have been considered by courts of equity many times, and have uniformly been held unobjectionable in equity.

Olcott v. *Bynum*, 17 Wall. 44, 62.
Ruggles v. *So. Minn. R.R. Co.*, F.C. 12,121, Circuit Ct., Dist. of Minn.
Gregory v. *Marks*, F.C. 5,802 (C.C.N.D. Ill.).
Protector Loan Co. v. *Grice*, 5 Q.B.D. 592.
Sterne v. *Beck*, 1 D.G.J. & S. 595.
Wallingford v. *Mutual Society*, L.R. 5 App. Cases, 685.
Morling v. *Bronson*, 37 Nebraska, 608.
Spring v. *Fiske*, 21 N.J. Eq. 175.
Harris v. *Powers*, 129 Ga. 74.
Robinson v. *Loomis*, 51 Penn. 78.
Platt Barber Co. v. *Johnson-Peterson*, 168 Penn. 47.
Andrews v. *Jones*, 3 Blackf. (Ind.) 440.
Mulcahey v. *Strauss*, 151 Ill. 70.
Cassidy v. *Caton*, 47 Iowa, 22.

It is worthy of observation at this point to note that the decision below places the Filene Company in the anomalous position of being charged with having exacted an illegal and nefarious agreement in permitting the Butler Company to pay the bonus in instalments of $20,000 per year instead of exacting the payment thereof in cash at once and thereby depriving the other creditors of assets to the extent of that payment.

IV.

CERTAIN MINOR QUESTIONS HAVE ARISEN HEREIN.

A. THE RATE OF DISCOUNT IS SIMPLE DISCOUNT WITH MONTHLY RESTS.

As to the rate of discount if the claim is provable, the receivers contend that the present value of the $20,000 per year should be determined by discounting with annual rests at five per cent. compound discount. The claimant contends that the correct method of determining this amount is by discounting the payments monthly at simple discount.

The lease provides upon this that upon default the amount so to be paid is $20,000 "less the 5% discount as aforesaid." The only "aforesaid" to which this can refer is to the clause on page 33, paragraph 2 of the Record, which provides that upon the termination of the over-lease by request the lessee shall pay a sum equal to $20,000 per year for each year of the term hereof unexpired, "less a discount of five per cent. (5%) on payments so anticipated." The payments provided for by the lease are monthly payments. It follows, therefore, that the anticipation is upon a monthly basis.

It is also submitted that the word "discount" as used in the lease must refer to a simple discount since that is the usual form of discount allowed by law.

Eastin v. *Third Nat. Bank*, 102 Ky. 64.

B. THERE IS NO RIGHT TO SET OFF.

The receivers contended that if the only claim provable is that for the obligations which run for the period November 1 to November 7, they are entitled to set off against this the amount of the taxes paid in advance. Upon this point the District Court ruled against the receivers. Since no appeal was taken by the receivers this point must be taken as concluded.

CONCLUSION.

In conclusion it is submitted that the fact that the claim of the Filene Company for damages did not accrue until after the appointment of the receivers does not prevent its allowance herein, for both according to principle and authority claims are provable in equitable receivership proceedings which accrue before the date finally set for the final proof of claims, although they were contingent at the date of the appointment of the receivers.

It is submitted further that there is nothing in the nature of the claim of the Filene Company to prevent its proof on an equality with other creditors. It is a claim for just compensation for an actual loss, and contains no element of penalty or illegality. The objection that the claim is for future rent or for accelerated rent is without foundation, — there is no attempt here to recover rent or to obtain both compensation for the use of the premises and the premises themselves. The Filene Company seeks only damages for a breach of the agreement of the Butler Company.

And finally the Filene Company contends that the greater part of its claim was an accrued claim in gross before the appointment of the receivers, and that the whole had accrued before these proceedings became proceedings for distribution; and that for these several reasons also the claim is in whole or in greater part provable.

Respectfully submitted,

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No. 93.

William Filene's Sons Company,
Petitioner,

v.

Charles F. Weed et al., Receivers,
Respondents.

Brief for Respondents.

Charles F. Choate, Jr.,
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ADDISON C. GEROULD & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

October Term, 1917.

No. 93.

WILLIAM FILENE'S SONS COMPANY,
PETITIONER,
v.
CHARLES F. WEED ET AL., RECEIVERS, RESPONDENTS.

Brief for Respondents.

BRIEF STATEMENT OF THE CASE.

The facts in detail are so clearly stated in the master's report (p. 60) and the opinion of the circuit judge (p. 74), which was adopted by the Circuit Court of Appeals (p. 92), that no restatement is necessary. The salient points upon which the argument is based are these:

November 7, 1912, a creditor's bill was filed against William S. Butler & Company, Inc., praying distribution of its assets equitably among its creditors in the event that its indebtedness could not be discharged in full. On the same day the receivers were appointed (Record, pp. 4, 6). The Filene lease had not then been broken. Nothing was due under it until December 2. The mere appointment of receivers gave the lessor no right of re-entry. The receivers paid, on December 2, a sum equivalent to the rental, but when they elected,

on December 5, not to adopt the lease, the lessor rightfully applied the amount toward the receivers' obligation for use and occupation. Thereupon the lessor entered on December 9 and terminated the lease.

As soon as the lessor elected to enter, instead of awaiting a possible emergence of the lessee from receivership, and had completed its entry, certain rights arose in favor of the lessor against the lessee, under the terms of the lease.

1. The right to demand the present value of $20,000 per year up to February 27, 1921 (Record, p. 37).

This amount, if computed at compound annual discount, is $132,125. If computed at simple monthly discount, it is $137,587.36 (Record, p. 66). The present value, properly discounted, became an obligation of the lessee, irrespective of the success of the lessor in reletting the premises. Even if it relet immediately at a profit, the lessee was nevertheless bound to pay this amount on demand. The appellees have been disposed to regard this requirement as in the nature of a penalty for default. The appellants, on the other hand, have called it in argument a "bonus" or "liquidated damages." Evidence of negotiations prior to the lease dealing with the $20,000 item was admitted by the master, subject to our exception. The circuit judge ruled that the evidence should have been excluded, and held that the $20,000 a year payment, while the lease remained in force, was part of the rent, and that the requirement that the lessee must pay the present value on default resembled in character a penalty, and in any event was an acceleration of rentals taking effect upon default (Record, pp. 79, 80, 83). This amount, computed by the claimant at $137,587.36,

and by the receivers at $132,125, is the first disputed item of the claim (Record, p. 66). The receivers contend that no part of it is provable, because the claim did not come into existence until after the entry, which was after the receivership. If that is not a sufficient ground, they assert that it is a claim—

(1) for future rent discounted back to date of entry;

(2) for acceleration of future rentals, taking effect after insolvency;

(3) for a penalty.

Whatever it may be called, and whatever would be the right of the lessor to collect it from a solvent lessee, they contend that it is not entitled to rank in insolvency with claims which were in existence on November 7, 1912.

2. The right to elect to receive from the lessee "sums equal to the rent and other payments herein named at the same time and in the same instalments, or if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate instalments as liquidated damages for so much of the unexpired term as is represented by such instalments, deducting in such case, however, such sum paid under the preceding clause as represents a part of such instalment" (Record, p. 37).

The claimant elected to proceed under this clause from January 1, 1913 (the receivers had paid it for use and occupation a sum equivalent to the December rent), until April 1, 1913, the date when the entire premises were relet.

The amount for which the lessee would be liable under this election is $39,829.80.

The receivers contend that no part of it is provable, because the claim did not come into existence until after the entry, and after a subsequent election by the lessor.

If this is not a sufficient ground, they assert further that, since it is in terms a claim for future rent, it is such a claim as substantially all the authorities have disallowed, whether in insolvency, bankruptcy, or receivership.

3. The right to elect to receive from the lessee "as damages, a sum which, at the time of such termination or at the time to which instalments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, deducting, however, such sum as has been paid for the same period under the above clause requiring a payment of $20,000 for each year or fractional part thereof" (Record, p. 37). The claimant elected to proceed under this clause from April 1, 1913. Calling the rental value the amount payable under the new leases for the unexpired term, and deducting that amount from the rent reserved in the terminated lease, it appears that the lessee would be liable under this election for $34,433.47.

The receivers contend that no part of this item is provable, because the claim did not come into existence until after the entry and after a subsequent election by the lessor.

If this is not a sufficient ground, they assert that it

is in substance a claim for future rent; that whether the claim be stated as "rent"—or "rent less rental value of the premises"—or "damages on account of rental value being less than rent," there is no essential difference.

The covenants of the under-lease upon which the above three claims are based have been summarized by the circuit judge as follows (p. 80):

> "The annual $20,000 payments to be made until 1921 were all to become immediately due and payable subject to the discount of 5 per cent. Any difference between the rent reserved in the over leases for the whole unexpired term and the rental value of the premises at the time of re-entry was to be paid in addition."

No obligation under any of them could arise until after the default, entry, and demand or election by the lessor. Therefore we are not dealing with a contingent claim, made certain before the date for distribution, but with a claim which at the critical date was non-existent, but which, to use the language of the circuit judge (p. 82), "has since come into existence through subsequent dealings wholly between the insolvent and the particular creditor, relating wholly to a leasehold interest forming no part of the estate to be distributed, and is dependent not only for its existence, but also as to the time at which it should come into existence and as to its amount, upon election by the creditor while these proceedings were pending."

The petitioner has also claimed, as commissions and expenses of reletting, $9724.39.

The receivers object to the allowance of this claim on the above general ground, and also because it does not appear that any covenant of the lease gives the lessor a right to recover such commissions even as against the lessee.

The petitioner's claim for $3739.48, being the apportioned amount of rent and other payments accruing between November 1 and November 7, 1912, was recommended for allowance by the receivers, allowed by the Court, and is conceded.

ARGUMENT.

The argument will take up first a discussion of the authorities, dealing first with precedents where the rights of a lessor were in question, next with decisions somewhat analogous where contracts other than leases were concerned.

Thereafter we shall argue that the well-settled bankruptcy rule of *Slocum* v. *Soliday*, 183 Fed. 410, ought to be followed in equity.

Finally, since the statutes and decisions in other jurisdictions have involved the general subject in some confusion, we shall argue the question, in the light of general equitable principles, as though it were now raised for the first time.

I. Precedents and Other Decisions.

A. Precedents in Equity Receivership in Absence of Statute.

The only text-book which mentions the point is Alderson on Receivers. It says (sec. 269) that the lessor has no provable claim, citing only—

Fidelity &c. Co. v. *Armstrong*, 35 Fed. 567 (C.C. Ohio):

Lessor's claim not provable—decision.

Other decisions are—

Pa. Steel Co. v. *N.Y. City Ry. Co.*, 198 Fed. 721, 744 (C.C.A. 2d):

Decision allowing claim for breach of executory contract, in dictum, distinguishes lease cases.

Crosstown Co's. Appeal, 198 Fed. 756, 760 (C.C.A. 2d):

Decision disallowing claim for breach of covenant to pay rentals.

Chemical National Bank v. *Hartford Deposit Co.*, 156 Ill. 522, 528:

Decision that, as the lessee broke covenant to pay rent nine days before the date of the receivership—the rent being payable in advance, the lessor could prove damages. It was assumed that if there was no breach before receivership the lessor would have no provable claim.

Upon writ of error in Supreme Court, 161 U.S. 1, 10, the same assumption was made.

B. Precedents in Equity Receivership under Winding-up Statutes.

Woodland v. *Wise*, 112 Md. 35:

At the date of the receivership there was overdue one monthly instalment of rent, which was payable in

advance. It does not appear whether, under the lease, all future rent became payable upon default as to one instalment. *Held*, that the lessor could prove as damages the entire rent to the end of the term, which expired before the first dividend.

People v. *St. Nicholas Bank*, 151 N.Y. 592:

Landlord proved claim for indemnity under the terms of the lease, although the breach occurred after the receiver was appointed.

Kalkhoff v. *Nelson*, 60 Minn. 285:

Under a voluntary proceeding for dissolution of a corporation, *applicable to both solvent and insolvent corporations*, the landlord proved a claim for damages on account of failure to pay rent. There had been no prior breach. The Court pointed out that all discussion of rights in bankruptcy and insolvency was irrelevant, because the construction of this statute must be the same whether the corporation is insolvent or solvent, and any construction which would permit the distribution of a solvent corporation's assets among its stockholders without payment of damages for breach of its contracts must be rejected.

Minn. Baseball Co. v. *City Bank*, 74 Minn. 98:

Similar decision to *Kalkhoff* v. *Nelson*, *supra*, the proceeding, however, being a receivership under an insolvency statute.

People v. *Nat. Trust Co.*, 82 N.Y. 283:

Landlord's claim provable in winding up a solvent

corporation. The receiver had enough assets to pay all debts and leave $1,000,000 for the stockholders.

McGraw v. *Union Trust Co.*, 135 Mich. 609:

Landlord proved damages on account of breach subsequent to receivership.

The American statutes under which the above cases arose made no specific provision for such claims.

In considering now the English cases we must observe the terms of the English Winding-up Statute:

Companies' Act, 1908, 8 Edw. VII, c. 69, sec. 207 (this section was enacted in 1875 as section 10 of the Judicature Act):

"In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

The English Debtors' Act of 1869, 32 and 33 Vict. c. 62, then provided and now provides as follows:

Sec. 23. After providing for disclaimer by the trustee:

> "If the property disclaimed is a lease it shall be deemed to have been surrendered on the date of the order of adjudication. . . . Any person injured by the operation of this section shall be deemed to be a creditor of the bankrupt and may accordingly prove the same as a debt under the bankruptcy."

Sec. 37:

> "Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy."

Thus while the English Bankrupt Act does not apply to insolvent corporations, its rules for proving claims are imported into the Companies' Act.

In winding up under the Companies' Act a distinction is observed between solvent companies, where the landlord's claim interferes only with dividends to the stockholders, and insolvent companies, where the landlord's claim, if allowed, will diminish the dividend of those who were creditors at the date of winding up.

Gooch v. *London Banking Assn.*, 32 Ch. D. 41 (1886):

A solvent company, on winding up, will not be

permitted to distribute its assets without regard to its landlord's right to future rent. Distribution was enjoined until provision made for landlord's future claim. (Pending appeal, the case was settled.)

See also *Lord Elphinstone* v. *Monkland Co.*, 11 A.C. 332 (1886).

Compare—

In re Haytor Granite Co., L.R. 1 Ch. App. 77 (1865):

Horsey's Claim, L.R. 5 Eq. 561 (1868):

Upon winding up an insolvent company a landlord cannot prove for future rent, and the existence of his claim does not prevent the distribution of the assets regardless of his claim.

These two cases were before the Bankrupt Act of 1869 and before the Judicature Act of 1875, but in—

Re New Oriental Bank Corp'n, [1895] 1 Ch. 753—

it was held that the decisions are still good law, on the ground that there can be no proof for future rent unless the lease can be disclaimed, which in winding up is not allowable. But proof was allowed for breaches up to the date of the decision.

In re Panther Lead Co., [1896] 1 Ch. 978:

Voluntary winding up of an insolvent corporation which was lessee of an onerous lease. The liquidator raised the question whether the lessor was entitled to prove as a creditor for future rent or damages under the lease. The lessor offered to

determine the lease, which the trustee could not, under the law, disclaim without the lessor's consent, on being allowed to prove his damages.

ROMER, J., avoided decision of the question by suggesting that the liquidator ought to make this compromise. He said, "After the expression of my opinion I have no doubt he will enter into it." Doubtless the liquidator followed the suggestion, as the question has not since arisen in England.

His other suggestion in the case, that since the bankruptcy case of *Hardy* v. *Fothergill*, 13 A.C. 351, the old cases as to proof by a lessor should be reconsidered, is offset by the remark of VAUGHAN WILLIAMS, J., in *Re New Oriental Bank Corp'n*, *supra*, that *Hardy* v. *Fothergill* has no application to a subsisting lease.

C. PRECEDENTS UNDER STATE STATUTES DEALING WITH INSOLVENT ESTATES.

Such statutes have been so specific in dealing with provable claims that few decisions exist upon the point.

The Massachusetts statute relating to the insolvent estates of deceased persons (Rev. Laws, c. 142, secs. 2, 10) provides in general terms for the allowance of all claims against the estate.

In *Deane* v. *Caldwell*, 127 Mass. 242, it was held that a lessor may prove for rent up to the time the claim is presented, but not for future rent or for damages. GRAY, C.J., pointed out the distinction between a living insolvent, against whom any liabilities not provable may later be enforced, and the insolvent estate

of a deceased person, where any claims not provable are wholly lost. In view of this distinction the statute has not, like the bankruptcy and insolvency Acts then in force, limited the right of proof to claims existing at the date of insolvency. Nevertheless, while the lessor may prove for rent up to the time of presenting the claim, "as regards future rent there has been no breach that will sustain an action either for rent or for damages. . . . A court of equity will not, in distributing assets among creditors, afford a lessor any further remedy on account of future rent than a court of law."

Under the Massachusetts Insolvent Act, before 1879, the lessor could prove only for the rent payable up to the rent day next preceding the insolvency.

Abbott v. *Stearns*, 139 Mass. 168.

As to leases made after April 22, 1879, the statute of 1879, c. 245, provided:

> "When any of the property of a debtor consists of a lease . . . the assignee at any time may, and at the request in writing of either the debtor or the lessor . . . shall . . . elect either to accept . . . or to disclaim the same. . . . And the debtor, provided he obtains his discharge in insolvency, shall be discharged from all liability under or by reason of said lease, . . . whether the assignee does or does not disclaim the same as aforesaid; . . . and the lessor . . . may prove such damages, if any, as are caused by such surrender, as a debt against the estate of the debtor."

This statute, in—

Bowditch v. *Raymond*, 146 Mass. 109—

was strictly construed, and held not to apply to a lease determined by entry before the first publication of notice. The case is of importance, therefore, as showing what the Massachusetts Court would hold in an equity receivership.

The lease provided that if the lessees should assign for the benefit of creditors, the lessors might enter, and in their discretion relet the premises at the risk of the lessees, who should continue liable for the rent less any sums realized from reletting. The lessees assigned for the benefit of creditors. Thereupon the lessors entered. The lessees went into insolvency. The lessors relet at a loss and tried to prove a claim for the difference.

Notwithstanding an able argument by J. B. Warner, Esq., who contended that, even without the statute of 1879, the claim was provable on general equitable grounds—not as a claim for future rent, but as a claim for damages which had been made certain before distribution, the Court disallowed the claim.

Morton, C.J., after premising that future rent cannot be proved, as the very existence of the claim is uncertain:

> "The appellants contend that under this provision the liability of the lessees arises solely from their covenant and that the amount to be paid by them is not technically rent, as the provision does not contemplate that they are to occupy the premises. But however this may be, the sums partake of the character of rent so

largely that they come within the same principle. The covenant is to pay the rent reserved reduced by such sum as the lessors might receive from the new lessees, if they should re-let the premises."

See *Shaw* v. *United Shoe Machinery Co.*, 220 Mass. 486.

D. Precedents under Common-Law Assignments for the Benefit of Creditors.

Hoyle v. *Scudder*, 32 Mo. App. 372:

Claim of unliquidated damages for breach by lessee of a covenant to deliver up the premises in good condition. Before the assignment the lessee made alterations which, unless restored before the end of the lease, would then amount to a breach of the covenant. In consequence of the assignment the lessor entered and terminated the lease. The assignment made it impossible for the lessee to restore the premises, hence there was an anticipatory breach. The claim was allowed.

Reynolds v. *Fuller*, 64 Ill. App. 134.
Chicago Fireplace Co. v. *Tait*, 58 Ill. App. 293.
Smith v. *Goodman*, 149 Ill. 75.
Wilder v. *McDonald*, 63 Ohio St. 383.

In these four cases the landlord's claims were allowed without adequate discussion.

Re Reading Iron Works, 150 Pa. St. 369:

The lessee, by an agreement co-ordinate with the

lease, to induce the lessor to purchase the lot and erect buildings especially suited to the lessee, promised to pay 9 per cent on the investment for ten years. Lessor's claim allowed. "The demand is not for future rent but for the loss he suffers by reason of the difference of the rentals now obtainable in consequence of the peculiar arrangement and construction of the premises, and the rental agreed upon as an inducement to him to make the investment for the company."

Matter of Whitney, 144 App. Div. 117 (affirmed without opinion, 202 N.Y. 580):

After an assignment by the lessee, the lessor did not enter, but the assignor (lessee) continued to occupy. The lessor was permitted to prove for future rent to the expiration of the lease.

The only case in which the point received thorough discussion is—

Matter of Hevenor, 144 N.Y. 271:

The assignment provided that the assignee should apply the proceeds to the debts and liabilities of the insolvent "then due or to grow due." The lessor entered and terminated the lease in consequence of the assignment. The Court held that the lessor by his act of re-entering put an end to the obligation under the lease, and left it for the future to determine whether the lessor would have any claim. This liability, the subject of proof, could not exist when the assignment was made, but arose subsequently thereto. "Such after accruing debts or liabilities could not be intended to be secured by a deed of as-

signment and if the assignor so declared in the deed of assignment it would be void."

This decision is important because, upon general equitable principles and not upon the construction of any statute, it refused to give effect to an express provision of the contract which attempted to rank the future obligation under the lease on a par with accrued claims.

In *Cotting* v. *Hooper-Lewis Co.,* 220 Mass. 273, under an assignment for the benefit of creditors, which provided that the bankruptcy rules should apply, it was held that the lessor, in a situation like the case at bar, had no provable claim. The case contains a full discussion of the bankruptcy decisions and follows *Slocum* v. *Soliday.*

In *Shaw* v. *United Shoe Machinery Co.,* 220 Mass. 486, under an assignment which provided that provable debts should be such debts as would be provable under the Massachusetts Insolvency Statute, it was held that the lessor of machinery, retaking possession under its lease, had no provable claim against the assignee, because its claim did not exist before the date of assignment.

In *Gardiner* v. *Parsons,* 224 Mass. 347, the lessee's breach of its lease of real estate and the lessor's entry both occurred before the assignment, which made no material provision as to provability of claims. *Held* that the lessor, unless he had waived his rights, had a provable claim for damages, "which upon liquidation are to be treated as due and payable on the

date of termination and constitute a claim or debt of the assignor in existence at the date of the assignment."

E. Precedents under Bankrupt Acts.

The present English Bankrupt Act is so sweeping in its terms that the simple question of proving damages from breach of covenant to pay rent is not open. It is a liability "future" or "contingent" to which the bankrupt "may become subject before his discharge by reason of any obligation incurred before the date of the receiving order" (section 37). Also, the lessor is a person injured by the trustee's disclaimer, and may accordingly prove his damages "as a debt under the bankruptcy" (section 23).

Under it was decided—

Ex parte Llynvi Coal & Iron Co., L.R. 7 Ch. App. 28:

Upon disclaimer by the trustee the lessor proved the difference between the rent reserved and the rental value.

Some examples showing how far the Act has been construed to extend are the following:

Hardy v. *Fothergill*, 13 A.C. 351:

The assignee of a lease covenanted with the lessee to indemnify him against the covenant to yield up the premises in good repair at the end of the term. The assignee becoming bankrupt, it was held that the possible claim, not existing at the time of bankruptcy

nor yet at the date of discharge, that the premises might be out of repair eight years thereafter was provable.

Lord Selbourne, however, reserved the right to draw a line somewhere, and intimated that a promise to marry (not broken), for example, might be excluded from the operation of the Act and not be discharged or proved.

Ex parte Neal, L.R. 14 Ch. D. 579:

By a separation deed the husband granted to the wife a life annuity, determinable upon three contingencies, (1) that the wife should become unchaste, (2) that she should be divorced, (3) that cohabitation should be resumed. In the husband's bankruptcy each of these separate contingencies had to be valued, difficult though the estimate was, and proof made, with an abatement for the value of each contingency. The Court, Bramwell, L.J., said it was amusing to see how Parliament in the past had been unable to accomplish its object of freeing bankrupts from all claims. "Now, however, they have used as extensive words as it was possible to use, and it is difficult to see how any case could arise which would not come within them."

In—

Victor v. *Victor,* [1912] 1 K.B. 247, 251—

Cozens-Hardy, M.R., said that under the Bankrupt Act, however difficult it might be to measure the husband's liability under such a separation deed, still it must be estimated.

Cf. *Dunbar* v. *Dunbar*, 190 U.S. 340—

as illustrating the difference in theory between the English Bankrupt Act and ours.

But even under the English Act future alimony cannot be proved.

Linton v. *Linton*, 15 Q.B.D. 239.

Under the Irish Bankrupt Act the only lease decision is—

In re Leeks, [1902] 2 Ir. Rep. 339:

Here it was held that the lessor might prove for the unpaid rent down to the date of adjudication, apportioning it between rent days. The trustees in bankruptcy paid for use and occupation for a while at the same rate as the rent, then disclaimed the lease. The landlord took back the premises, proving no claim for future rent or damages.

The United States Bankrupt Act provides that the following classes of debts may be proved:

> §63 (*a*) Debts which are (1) a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing the petition against him whether then payable or not. . . .
> (4) payable upon an open account or upon a contract express or implied.

It is settled in this circuit and in other circuits that the contractual obligation of the lessee to indemnify the lessor for loss of rents, or diminished rental

value arising upon the lessor's entry after the filing of the petition, is not provable.

Slocum v. *Soliday*, 183 Fed. 410 (C.C.A. 1st).
In re Roth & Appel, 181 Fed. 667 (C.C.A. 2d).
See *Colman Co.* v. *Withoft*, 195 Fed. 250 (C.C.A. 9th).

In *Slocum* v. *Soliday* the terms of the lease are not to be distinguished from those in the present case, and, as here, the lessee's liability had ceased to be contingent before the time for proof. Therefore, if this claim were in bankruptcy instead of in equity, it must be disallowed. The obligation did not exist at all, even in a contingent form, at the time of filing the petition. Unlike the obligation of an indorser upon commercial paper—

In re Smith, 146 Fed. 923;
Moch v. *Market St. Nat. Bank*, 107 Fed. 897;
In re Semmer Glass Co., 135 Fed. 77—

it did not come into existence until the lessor elected to enter and terminate the lease.

Such claim, like a claim for future rent, is no more provable under clause (4) than under clause (1) because, as the Supreme Court has said, "reading the whole of Section 63 and considering it in connection with the spirit and purpose of the Act, we deem it plain that the debts founded upon open account or upon a contract, express or implied, that are provable under Section 63*a* (4) include only such as ex-

isted at the time of the filing of the petition in bankruptcy."

Zavelo v. *Reeves*, 227 U.S. 625, 631.
See *In re Swift*, 112 Fed. 315 (C.C.A. 1st).
Central Trust Co. v. *Chicago Auditorium*, 240 U.S. 581, 590-593.

Even under the Bankrupt Acts of 1841 and 1867, which provided for proof of contingent and uncertain claims, a claim of this character, whose very existence was subject to a contingency, was not provable.

PUTNAM, J., in *Slocum* v. *Soliday*, 183 Fed. 410, 412.
GRAY, C.J., in *Deane* v. *Caldwell*, 127 Mass. 242, 244.

F. DECISIONS IN SITUATIONS SOMEWHAT ANALOGOUS, NOT INVOLVING LEASES.

If receivership prevents or interrupts the performance of an executory contract, not a lease, and the contract is not adopted by the receiver, the repudiation relates back to the date of the receivership and, under the doctrine of anticipatory breach, a claim for damages, if capable of determination without interfering with the proper administration of the estate, may be proved.

Pa. Steel Co. v. *N.Y. City Ry. Co.*, 198 Fed. 721, 739, 740.
Re Newdigate Colliery, Ltd., [1912] 1 Ch. 468 (semble).
New York Security & Tr. Co. v. *Lombard Investment Co.*, 73 Fed. 537 (C.C. W.D. Mo.).

The above cases probably represent the weight of authority, although there are cases contra.

See—

People v. *Globe Ins. Co.*, 91 N.Y. 174;
Malcomson v. *Wappoo Mills*, 88 Fed. 680—

holding that such contract is discharged by operation of law, leaving no allowable claim for damages.

Wells v. *Hartford Manila Co.*, 76 Conn. 27—

holding that such damages must be postponed to accrued claims, else the receiver's settled right to disaffirm executory contracts would be infringed.

Law v. *Waldron*, 230 Pa. 458—

holding that no claim could be proved for damages from breach of an agency contract caused by an insurance company going into receivership, the receivers not assuming the contract, since the order of the Court operates upon both parties alike and prevents the performance of contracts. The Court said that there was no Pennsylvania case directly on the point, but that the better rule, under such circumstances, was that no claim should be provable, particularly as there was no averment that the receivership was brought about for the purpose of ending the contract.

In bankruptcy also the decisions upon this point have been conflicting, until the Central Trust Co. case, *supra*, 240 U.S. 581.

That bankruptcy is equivalent to disablement and

repudiation, which gives rise to a claim for damages relating back to the date of filing the petition.

Ex parte Pollard, 2 Lowell, 411.
Re Swift, 112 Fed. 315 (C.C.A. 1st).
Re Pettingill Co., 137 Fed. 144 (C.C.A. 1st).
Pratt v. *Auto &c. Co.*, 196 Fed. 495.
Re Frank E. Scott Transfer Co., 216 Fed. 308 (C.C.A. 7th).
Re James Dunlap Carpet Co., 163 Fed. 541 (E.D. Pa.).
Re Stern, 116 Fed. 604 (C.C.A. 2d).
Re Neff, 157 Fed. 57 (C.C.A. 6th).
Re Duquesne Incandescent Light Co., 176 Fed. 785 (Pa.).
Re Dr. Voorhees Awning Co., 187 Fed. 611 (Pa.).

Contra:

In re Imperial Brewing Co., 143 Fed. 579 (D.C. Mo.).
Re Inman, 175 Fed. 312 (D.C. Ga.).
Re Inman & Co., 171 Fed. 185 (N.D. Ga.)
Re Amer. Vacuum Cleaner Co., 192 Fed. 939 (N.J.).
Re D. Levy &c. Co., 208 Fed. 479 (Md.).

Assuming that, both in bankruptcy and in receivership, it is right to allow proof of damages which reasonably flow from the mere termination or repudiation of an executory contract *other than a lease* which takes effect at the moment of insolvency, it does not follow that when a lessee becomes insolvent, and the landlord enters, the damages to which his entry

give him a right as against the lessee relate back to the moment of insolvency. There are three reasons why a lease differs from an executory contract in this particular:

(1) *Bankruptcy or insolvency does not terminate a lease.*

Ex parte Houghton, 1 Lowell, 554.
Re Ells, 98 Fed. 967.
Watson v. *Merrill,* 136 Fed. 359.
Re Roth & Appel, 181 Fed. 667.
Pa. Steel Co. v. *N.Y. City Ry. Co.,* 198 Fed. 721, 744.

In the lease here in issue the receivership did not even give the lessor a right to terminate, unless continued for ninety days (p. 36).

(2) *The doctrine of anticipatory breach does not apply to leases.*

Central Trust Co. v. *Chicago Auditorium,* 240 U.S. 581, 590.

A lease, since the essential obligations are all on the part of the lessee, falls within the exception to this doctrine that non-mutual contracts, where the consideration has passed, such as bonds and promissory notes, are not within the reason of the rule.

Roehm v. *Horst,* 178 U.S. 1, 17.

Furthermore, a little reflection upon the point shows that the doctrine cannot apply to a lease.

The doctrine, in its application to mutually executory contracts, whether partly performed or not, as

adopted by the federal Courts, is that the party not at fault, if he so elects, (1) is discharged from his future obligations, (2) must cease performance on his own part in order to minimize the damages, (3) may sue at once for damages instead of waiting for the day of performance.

Roehm v. *Horst*, 178 U.S. 1, and cases cited.

Now if the lessee on November 7, there being then no breach of the lease, notifies the lessor that the rent due December 1 will not be paid, the doctrine of anticipatory breach cannot operate.

The lessor's conduct is not affected in any way. He cannot interfere with the lessee's enjoyment of the premises until default, any more than the holder of a promissory note can attach the maker's property before the note is due. He has no right to enter until default, because no such right is conferred by the lease. A lease is more than a contract; it creates an estate in the lessee, and the lessor is a trespasser if he enters except as permitted by the lease. After default and entry the lessor still has no right to sue for damages, unless the lease confers that right. When that right exists, as under the present lease, it is conditioned upon the lessor's previous entry and election.

Even if the receivers' refusal to adopt the lease, made on December 5, relates back, like their rejection of a mutually executory contract, to November 7, nevertheless it cannot give the lessor any greater rights than would have been given by a definite renunciation by the lessee itself on November 7.

Also we do not concede that the receivers' election either to adopt or not to adopt a lease relates back to the beginning of the receivership. Suppose they adopt a lease before any breach by the lessee. Their adoption for the estate does not prevent the corporation's breach on the next rent day. On that day the corporation commits a breach, but the receivers have substituted themselves for the corporation and have a right to compel the lessor to accept their performance in place of performance by the corporation, unless, as in the case at bar, the lease provides that in consequence of receivership the lessor may enter and terminate the lease.

Suppose, on the other hand, they decline to adopt the lease for the benefit of the estate, before anv breach by the lessee. Their refusal to substitute themselves for the lessee is not any breach by the lessee.

It is hard to see how the receivers' action one way or the other can have any effect on the lease.

> See NOYES, J., in *Pa. Steel Co.* v. *N.Y. City Ry. Co.*, 198 Fed. 721, 744.

In *Re Mullings Clothing Co.*, 238 Fed. 58 (C.C.A. 2d), a contract to take a future lease was repudiated by the corporation in August. The lease was to begin October 1. The corporation was adjudicated bankrupt December 30, on its voluntary petition.

The decision that the agreed lessor could prove damages against the bankrupt estate on account of the breach, which occurred before the petition in bankruptcy, is not in conflict with the proposition for which we contend. Clearly, there may be anticipa-

tory breach of a contract to take a future lease, and, if such breach occurs before bankruptcy, or before an equity receivership, a provable claim exists.

The Court said (p. 68):

> "We do not overlook the doctrine that a covenant to pay rent creates no debt until the time stipulated for the payment arrives, and therefore that rent accruing under a lease after the filing of a petition in bankruptcy against the lessee is not provable against his estate as a fixed liability absolutely owing at the time of the filing of the petition. Such a claim we have held to be contingent, and not provable in bankruptcy. That doctrine was applied by this court in Re Roth & Appel, 181 Fed. 67, 104 C.C.A. 649, 31 L.R.A. (N.S.) 270 (1910), and we have no doubt that it was correctly applied. But that doctrine is not at all relevant to the facts of this case. This is an action for breach of contract, occasioned by the steps taken to wind up and dissolve a corporation, which breach occurred prior to the bankruptcy. It has no analogy to a case of ordinary bankruptcy of an insolvent tenant. The filing of the petition in bankruptcy in such a case does not terminate the relation of landlord and tenant, but the tenant remains liable for the future rent as it accrues. It does not end the capacity of the tenant to engage in future business and to acquire other assets which can be reached by the lessee in subsequent proceedings for the payment of the rent which subsequently accrues. It does not involve an abandonment of the lease,

and does not disable the tenant from afterwards performing its covenants."

(3) *The lessor's right to damages arises solely from the covenant to indemnify, which comes into effect only upon his entry and subsequent election.*

Sutton v. *Goodman,* 194 Mass. 389.
Weeks v. *International Trust Co.,* 125 Fed. 370 (C.C.A. 1st).

In other words, the damages are dependent upon an intervening act of the lessor which occurs after the date of insolvency.

Therefore the executory-contract decisions are not in point, and any argument drawn from them is based upon a false analogy.

More nearly analogous to the present situation are the cases dealing with insolvent insurance companies. As of the date of the receivership the rights are fixed. Policyholders claim the unearned premiums as of that date. Policyholders who have suffered losses before that date prove for their losses in addition to their unearned premiums. But all losses occurring after that date are excluded from proof. The claim for a subsequent loss not being in existence at the date of insolvency, but, like the claim for indemnity in the case at bar, arising in consequence of an intervening occurrence after the date of insolvency, is excluded.

This rule, now universally applied, was slow in development.

In *People* v. *Security Life Ins. Co.*, 78 N.Y. 114, the Court, after the time for proof of claims had expired, permitted the claimant to file an amended proof showing that the insured had died since the time had expired, and allowed the claim for the full amount of the policy. The original claim had been for the value of the policy.

This case and others following it were overruled by—

> *People* v. *Commercial Alliance Life Ins. Co.*, 154 N.Y. 95—

holding that claims under policies of a life insurance company in receivership must be valued as of the date of commencement of the suit, and are not affected by the death of the insured after that date and before distribution.

This case cites and relies upon—

> *Burdon* v. *Mass. Safety Fund Assn.*, 147 Mass. 360.
>
> *Fogg* v. *Supreme Lodge*, 159 Mass. 9.
>
> *Ingersoll* v. *Missouri Valley Life Ins. Co.*, 37 Fed. 530 (Opinion by BREWER, Cir. J.).
>
> *Commonwealth* v. *American Life Ins. Co.*, 162 Pa. St. 586.

The last case is illuminating. It holds that the measure of the claim is the net value of the policy, without regard to the health of the insured, it being wholly impracticable to determine the actual state of each policyholder's health, *i.e.*, the probable difference between the face of the policy and the aggregate

premiums which he will live to pay. It holds that the same rule applies, although the insured dies before distribution. It criticizes *People* v. *Security Life Ins. Co., supra,* on equitable grounds, asserting that it is inequitable to fix some rights at the date of insolvency and allow others the benefit of contingencies happening thereafter. The following quotation is especially pertinent to the case at bar:

> "*They could not change the equilibrium of their equities as against each other by anything they could do themselves* [italics ours], and it ought not to be changed by the lapse of time or the course of events. The question is not what claim anyone has or would have by the lapse of time and the event of death, but what claim had each as against the others when the corporation disappeared from the scene and they were turned over to a fund insufficient to pay them all in full."

In *Ingersoll* v. *Missouri Valley Life Ins. Co.*, 37 Fed. 530, BREWER, Cir. J., said:

> "It is one of the settled propositions of law that when an insurance company becomes insolvent, and its assets are taken possession of by the court for distribution among its creditors, policies not yet matured will be adjusted at their surrender value, and to that amount established as present obligations against the company."

In *Universal Life Ins. Co.* v. *Binford*, 76 Va. 103, this question was left undecided because the claim-

ants whose claims were based on subsequent deaths failed to take exception to the master's report disallowing them.

In *B. & A. R.R.* v. *Merchants Transfer &c. Co.*, 82 Md. 535, it was held that insolvency of a casualty insurance company fixed all rights at the date of insolvency. For the accidents which happened after the insolvency was declared no claim could be proved, but since the company by its insolvency broke the contracts, the policyholders became entitled to damages for such breach, and their damages were the values of the destroyed policies, merely the unearned premiums.

In *People* v. *Metropolitan Surety Co.*, 205 N.Y. 135, the claimant held a bond to dissolve an attachment. At the date of the receivership there had been no judgment in the suit in which the attachment had been made. After receivership, and before distribution, the claimant recovered judgment, and thereupon filed a claim for the amount of it. The Court applied the life insurance rule, treating the judgment as equivalent to the death of an insured, and disallowed the claim.

See another case in the same receivership:

People v. *Metropolitan Surety Co.*, 211 N.Y. 107.

In England this question has had an eventful history, and is now settled by Parliament in accord with the rule as stated above.

See *In re Albert Life Assurance Co., Bell's Case*, L.R. 9 Eq. 706 (1870) JAMES, L.J.:

Winding up of insolvent life insurance company before the Judicature Act of 1875, sec. 10, made the bankruptcy rules applicable. Death of insured after insolvency, but before proof, does not entitle the holder to claim for the face of the policy, but only for its value. But his early death is admissible as evidence that the policy was worth more than its mathematical value. His claim is for what he would have had to pay as a single premium for the same policy in another company, considering his state of health at date of insolvency.

The next case is—

Lancaster's Case, L.R. 14 Eq. 72 n. (1872):

Winding up of insolvent life insurance company, also before the Judicature Act. Decision of Lord CAIRNS as arbitrator. Lord CAIRNS criticized the judgment of Lord Justice JAMES in *Bell's Case*, and decided that the claimant could prove only for the mathematical value of the policy at the date of the winding-up order, without considering his state of health or subsequent death.

Then came—

Holdich's Case, L.R. 14 Eq. 72 (1872)—

in which ROMILLY, M.R., disapproved *Lancaster's Case* and followed *Bell's Case*. He held that the policy must be valued at the date of the winding-up order, but that subsequent facts might be shown to

prove what was the real value to the claimant, such as the sudden death of the insured.

In 1875 the Judicature Act provided that in winding-up companies (insurance companies not excluded) the rules of the Bankruptcy Act of 1869 should apply. Accordingly, a future liability of the company upon its contract made before insolvency became provable.

Under this statute came—

In re Northern Counties Fire Ins. Co., Macfarlane's Claim, 17 Ch. D. 337 (1880):

Total loss suffered after winding-up order and before expiration of time for proof held a provable claim.

Finally Parliament took insurance companies out of both the Bankruptcy Act and the Companies' Act, and provided that the rule adopted by Lord CAIRNS in *Lancaster's Case, supra*, should apply, viz., that claims should be allowed for the mathematical value of policies at the date of the winding-up order.

Assurance Companies' Act, 9 Edw. VII, c. 49, sec. 17 (1909):

Under this Act arose—

In re Law Car & General Insurance Corporation, [1913] 2 Ch. 103:

In the winding up of an insolvent liability insurance company, the question came as to the provability of claims for indemnity against accidents which

occurred after the date of insolvency, but before the date of distribution.

The Act provided: "The value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule . . ."

"Sixth Schedule.

"(D) As respects Employers' Liability Policies.

"The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment."

The claimants contended that losses which occurred after the winding up and before final distribution were not "a liability requiring to be valued," since they were ascertained before it was too late to prove them, and hence that they could be proved as debts provable under the Companies' Act of 1908, which made the bankruptcy rules applicable. The lower Court decided for the claimants. NEVILLE, J.:

"I cannot find anything in the Act of 1909 inconsistent with the decision in *Macfarlane's Claim* (4). I gather from that decision that, whether the rules of bankruptcy apply or not, while it is open to the insured to prove at all he may prove for a claim that has ripened into a liability after the date of the winding up. The

> Act does not expressly deprive the insured of any existing right, but merely directs that in the case of a policy requiring to be valued it shall be valued in a particular way."

The decision was reversed by the Court of Appeal, which held that the above rule of valuation must be construed to exclude any other mode of valuation. Per COZENS-HARDY, M.R. (p. 119).

KENNEDY, L.J., in his concurring opinion, discussed the general principles of equity involved, and concluded that the judgment appealed from was "alike erroneous in regard to the construction of the statute, and leads to results undesirable in point of justice."

BUCKLEY, L.J., dissenting, was of opinion that the principle of *Macfarlane's Claim* was as applicable under the Act of 1909 as it was before (p. 127).

> "At the date of the winding up the contract indemnified the policyholder against liability in respect of all accidents which happened during the currency of the policy and all risk in respect of accidents which did not happen. If before proof an accident occurs, he receives the pecuniary amount for which he is chargeable by reason of the accident, and also protection against all other accidents if any should occur, but not if he receives a less sum. . . . The hypothesis is to be made that the contract of assurance came to an end at the winding up. What the policyholder is entitled to is the value of the contract at the date of the winding up, and the fact that there was an accident and the amount recoverable in

respect of it are no more than evidence to show what, at the date of the winding up, was the value to him of the contract contained in the policy which as at that date is to be taken to have come to an end'' (pp. 125, 126).

That case, in its diverse opinions, both of which were justified by the statute, illustrates pretty well the contentions at bar.

The majority view, as applied to our case, would be that the lessor is entitled to get back his premises, but is not entitled to prove a claim for loss through the lessee's failure to indemnify the lessor according to agreement for the loss of rent occurring after and by reason of the lessee's insolvency.

II. In Equity the Settled Bankruptcy Rule should be Followed.

If this estate were being administered on the bankruptcy side of the District Court, there would be no provable claim.

Slocum v. *Soliday,* 183 Fed. 410 (C.C.A. 1st).

Re Roth & Appel, 181 Fed. 667 (C.C.A. 2d).

Colman Co. v. *Withoft,* 195 Fed. 250 (C.C.A. 9th).

Very strong reasons must be shown to justify the District Court sitting in equity in arriving at the opposite result. It would be startling if a future contingent claim, not existing at the date of insolvency, should be allowed to share the assets in equity, when

it has no standing in bankruptcy. In both systems equally the lessor has no practical remedy against the insolvent corporation.

In an equity receivership—

> *Conklin* v. *U.S. Shipbuilding Co.*, 136 Fed. 1006 (C.C. N.J.)—

the argument was pressed, as here, that when a corporation's property is taken into the custody of the Court for distribution among its creditors the corporation is dead for all practical purposes, and justice demands that parties having such future claims should have preserved to them a right to participate in the distribution. But the Court held that the rules in bankruptcy should be followed so far as applicable, especially when the corporation is one which might have been adjudged a bankrupt.

In the Massachusetts Courts equity follows the rules of distribution, which are fixed by the statutes of insolvency or bankruptcy.

> *Old Colony Trust Co.* v. *Medfield &c. St. Ry.*, 215 Mass. 156, 163.
>
> *Jones* v. *Arena Publishing Co.*, 171 Mass. 22, 29.
>
> GRAY, J., in *Commonwealth* v. *Ins. Co.*, 112 Mass. 131, 136.

The bankruptcy rule of *Slocum* v. *Soliday* is not inequitable. It is not dependent upon section 63*a* (1), which requires a provable claim to be a "fixed liability absolutely owing on the date of bankruptcy," but if equitably entitled to share in the assets, it would be provable under section 63*a* (4), as a debt

payable "upon a contract express or implied." It would be presumptuous to suggest that the Circuit Court of Appeals of the First Circuit overlooked clause (4). The trouble with the claim, both in bankruptcy and in equity, is that it could not exist at the date of insolvency, but arose subsequently upon the entry and election by the lessor.

See *Zavelo* v. *Reeves*, 227 U.S. 625, 631.
Pa. Steel Co. v. *N.Y. City Ry. Co.*, 198 Fed. 721, 744.
Crosstown Company's Appeal, 198 Fed. 756, 760.
Morgan v. *Wordell*, 178 Mass. 350.
Goding v. *Rosenthal*, 180 Mass. 43.
French v. *Morse*, 2 Gray, 111.
Loring v. *Kendall*, 1 Gray, 305.

That the lessor's claim, *if existing prior to the bankruptcy*, may be proved under section 63*a* (4) has been held by the Circuit Court of Appeals in the Third Circuit.

Ludlow v. *Pugh*, 213 Fed. 450, affirming—*Re Keith-Gara Co.*, 203 Fed. 585:

In that case the lease provided that, upon failure to pay an instalment of rent when due, the whole rent for the unexpired term at once became due and payable. An instalment payable in advance became due and was unpaid *before the bankruptcy*. The lessor claimed the future rent for the rest of the term, which was less than a year, under the Pennsylvania statute, giving a landlord priority for one year's rent. *Held*, the local statute being recognized by the Bank-

rupt Act, the provision of the lease was not against public policy, and the claim was provable under section 63*a* (4).

Martin v. *Orgain*, 174 Fed. 772 (C.C.A. 5th), was a decision under a similar local statute. The rent was due in advance March 1. The adjudication in bankruptcy was March 9. The date of the petition does not appear, but the opinion contains nothing in conflict with the decisions in the First, Second, and Ninth Circuits.

In re Desnoyers Shoe Co., 227 Fed. 407 (C.C.A. 7th), instead of conflicting with those decisions, cites them with approval.

Indeed, it is the spirit and purpose of the Bankrupt Act of 1898, although the language of section 63 is ambiguous, that only such debts are provable as existed at the time of filing the petition.

> *Zavelo* v. *Reeves*, 227 U.S. 625, 631.

Even under the Bankrupt Acts of 1841 and 1867, which expressly provided for proof of contingent and uncertain claims, a claim of this character, whose very existence was subject to a contingency, was not provable.

> PUTNAM, J., in *Slocum* v. *Soliday*, 183 Fed. 410, 412.
>
> GRAY, C.J., in *Deane* v. *Caldwell*, 127 Mass. 242, 244.

Logically, the same rule should apply in an equity receivership.

There is nothing to the contrary in—

> *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U.S. 1; affirming 156 Ill. 522, 528.

There the lessor's entry for breach was on May 1. The bank became insolvent on May 9. The receiver was appointed on July 21, and on July 27 he elected not to adopt the lease.

The state Court assumed that, if there had been no breach before insolvency, the lessor would have no provable claim. The question here presented was not considered either in the state Court or in the Supreme Court.

> 161 U.S. 1, at pages 9, 10.

In a recent case in the Seventh Circuit, upholding the right to prove damages for breach of an executory contract (not a lease) under section 63*a* (4)—

> *Re Frank E. Scott Transfer Co.*, 216 Fed. 308—

the Court of Appeals, SEAMAN, Cir. J., said:

> "In reference to the above mentioned authorities disallowing claims for breach of leasehold contract arising through bankruptcy, each must rest for approval on the distinction well pointed out in the opinion of the Circuit Court of Appeals of the Second Circuit—*In re Roth and Appel*, 181 Fed. 667—between the relation and rights of lessor and lessee of realty under such instruments and the rights of the contracting parties under general executory contracts. This

distinction is observed as well in a note appended to the opinion in *Pa. Steel Co.* v. *New York City Ry. Co., supra;* and thereupon these rulings become inapplicable to the present inquiry."

The same distinction was noted in the decision by this Court upon certiorari.

Central Trust Co. v. *Chicago Auditorium,* 240 U.S. 581, 590.

We assert, therefore, that the failure of the lessor's claim in bankruptcy, under circumstances like the present case, does not depend at all upon the restrictive language of the Bankrupt Act, but upon its essential lack of equity. The bankruptcy decisions, then, are sound guides for the judgment in this case, independently of the principle that equity follows the bankruptcy rules of administration wherever they are applicable.

III. The Appellant's Claim is Not Justified by the General Principles of Equity.

We shall now discuss together the claim for the present worth of $20,000 a year until 1921, and the claims for future rent and future damages.

As between lessor and lessee, upon entry the lessor had a right to collect the difference between the rent reserved, including the $20,000 a year, and the rental value of the premises. But if the rental value should be so great that there was no balance against the lessee, nevertheless the lessor could recover the value of $20,000 a year, at all events. Although the lessor should make a profit from reletting, the lessee would still be liable for this amount.

In other words, the lessee's promise was a promise to indemnify against loss, and, in addition, to pay the present worth of $20,000 a year. This payment of $20,000 a year was unequivocally expressed in the lease as rental. "Yielding and paying . . . as rental a sum equal to the aggregate rentals payable from time to time under the several leases to the lessor . . . together with a further sum of twenty thousand dollars yearly."

The lessee further covenants "to pay to the lessor the rent above reserved punctually when due . . . and including the payments at the times in said several leases to the lessor provided, and all other sums by said leases respectively required to be paid by the lessee therein, including all taxes."

The consequences of failure to pay the monthly instalments of $20,000 a year when due were the same as in case of failure to pay the sums required by the over-leases.

In spite of the plain terms of the lease the appellant contended that the yearly payment of $20,000 was not part of the "rent," but was a "bonus" payable by the lessee for the right to occupy the premises under the conditions in the various over-leases. Certain evidence of prior correspondence in which Mr. Butler referred to the payment as a "bonus" was admitted by the master and held inadmissible by the Court.

If anything turns upon what the payment is called, we assert that it must be called as denominated in the lease, a part of the rental payable at all events, no matter what might happen to the leasehold premises or to the lease. For example, if the lessor were

suing the lessee for the amount of the present claim, it would not be open to the lessee to defend, as to the $20,000 a year payment, by making a contention that although called rent it was intended to be a bonus in consideration of fixtures, etc., and that the consideration had failed.

The provision for this payment, further, was not stated as liquidated damages for actual losses suffered by termination, but as a penalty or forfeiture on termination, since it was required at all events, even in case of reletting by the lessor at a profit. Such a provision, even if called "liquidated damages and not a penalty" is unenforceable against other creditors in bankruptcy on general grounds of public policy, and consequently should be unenforceable in equity.

See *McCall Co.* v. *Denchler*, 174 Fed. 133 (C.C.A. 8th).

While extrinsic evidence is admissible to explain the subject-matter of the contract or to remove a latent ambiguity, this evidence is not offered for those purposes. In the language of the report, the claimant by it desired to show "that the $20,000 was intended by the parties as a bonus or consideration given the Filene Company for making the sub-lease to the Butler Company and not as a part of the rental." Since the lease is unambiguous upon this point, is express in its characterization of this payment as rental, and throughout is wholly consistent with this description and is consistent with no other, the receivers contend that the purpose of the evidence is to vary and modify the express terms of the lease, and therefore inadmissible. It is obvious, from an

inspection of the evidence offered in connection with the lease, that, whatever the parties in their preliminary negotiations may have called or considered the payment in question, whether one or both of them regarded it as an entire sum to be divided into instalments, or as a bonus, or as the rental of the sublease, when the parties finally agreed nothing but rental was in mind. This appears from the lease itself, which superseded all the preliminary agreements or negotiations. It is conceivable that the lessor at the time preferred to have this payment as rental rather than as a bonus, but, whatever the wishes of one of the parties, the final expression of both is that these payments be as rental during the existence of the lease, and as a forfeiture at its termination. This evidence is offered, not in explanation of something capable ot two interpretations, but to contradict the expressed terms of the lease and to put a meaning upon them which the words of the lease will not bear.

But we believe that it is of no importance to discuss what the $20,000-a-year provision might be called. It is simply that part of the rent which the lessor was to get for itself, over and above the amounts which it had to pay its over-lessors. Both parts of the rent—the lessor's part in full, and the part which went to the over-lessors less the rental value of the premises—are chargeable against the lessee, in consequence of the lessor's entry and election. As against the lessee they are accelerated by the default and entry. Whether the provisions for acceleration are applicable to a receivership which began before the entry upon which they were conditioned took place is the real question.

As shown by the master's report, there is very little, if any, money difference whether the three elements of the claim are separately figured as items 2, 3, and 4, on page 71, or whether the claim is stated as the difference between the amounts payable by the lessee from December 9, 1912, to the end of the lease, and the rental value of the premises on December 9, 1912.

Item 2. Present worth, December 9, of $20,000 per year, as computed by the claimant		$137,348 88
Item 3. Rent under over-leases January 1, 1913, to April 1, 1913		39,829 80
Item 4. Difference between rent and rental value of over-leases from April 1, 1913, to end of term		34,433 47
		$211,612 15
Compare—		
Rent and other payments due from December 9 to expiration		$1,463,413 56
Rental value December 9		1,213,655 43
Difference between rent and rental value December 9		$249,758 13
Deduct—		
Discount on $20,000 a year	$27,206 67	
Received from reletting	1,010 00	
Due from receivers from December 9 to January 1, 1913, approximately	9,929 31	
		38,145 98
		$211,612 15

If it were not for the covenants which in effect make the future payments, less rental value, immediately payable upon entry, the lessor would have no remedy for default, even as against the lessee, except his choice either to enter and take back the leasehold or to wait and sue for each instalment as it accrues. The lessor would have no action for damages.

Weeks v. *International Trust Co.*, 125 Fed. 370 (C.C.A. 1st).
Sutton v. *Goodman*, 194 Mass. 389.

The covenants which, as against the lessee, accelerate the future payments (Record, pp. 37, 38) require the lessee, upon the entry, to pay the present value of $20,000 a year for the unexpired term, irrespective of rental values, and, in addition, the aggregate rentals under the over-leases, less the rental value. The agreement to pay rentals, less rental value, though using the words "damages" and "indemnity," is, in legal effect, like the agreement to pay the present value of $20,000 a year, an acceleration of future rent.

In *Watson* v. *Merrill*, 136 Fed. 359 (C.C.A. 8th) Judge SANBORN said:

> "The contention of counsel for the appellant is that the claim of the lessor is not for rents which were payable after the petition for adjudication in bankruptcy was filed, but for damages for a breach of the contract in the lease to pay these rents, . . . and that for the breach of the contract to pay the rents accruing subsequent to the filing of the petition a claim for damages may be allowed in bankruptcy. . . . It is however, the

nature of the claim and not the name which is applied to it that conditions its provability in bankruptcy. Watson's claim was for $20. of the $60. per month which the lessee had agreed to pay him for rent of the leased premises for 115 months after the petition in bankruptcy was filed. In reality his claim was for the entire $60. per month. But he had received by the surrender to him of the premises . . . the rental value of the premises, $40. per month, so that the rent which he claimed remained unpaid, was but $20. for each month. . . . These facts demonstrate the proposition that while counsel and the referee called this allowance damages for a breach of the lease, it is in fact nothing but that part of the monthly rent which was to accrue after the petition was filed which the referee found that the lessee had not paid by his surrender of the leased premises to the lessor in March 1913. But rent which the bankrupt has agreed to pay and which is to accrue subsequent to the filing of the petition in bankruptcy does not constitute a provable claim because it is not 'a fixed liability absolutely owing at the time of the filing of the petition' and because it is not an existing demand, but both the existence and the amount of the possible future demand are contingent upon unforeseen events, such as default of the lessee, or entry by the lessor and assumption by the trustee so that it is neither an unliquidated or a liquidated provable claim. . . . If the rent for any month was not paid, the lessor had the option to re-possess himself of the premises and to withhold from thence-

forth the consideration for future installments of rent, or to permit the lessee to continue in possession of the property and to enforce the collection of the rents by an action or by some other proceeding. He could not however, do both. His resumption of the premises necessarily constituted in the absence of an express agreement to the contrary, a termination of the lease and a release of the lessee from the payment of all the installments of rent he had promised to pay thereafter."

See also *Bowditch* v. *Raymond*, 146 Mass. 109, 115. *Atkins* v. *Wilcox*, 105 Fed. 595 (C.C.A. 5th).

The real question is whether, as against the creditors of the lessee, a covenant to accelerate future rents is enforceable when such covenant cannot come into effect until after the receivership and after an entry and an election by the lessor.

The lease attempts to give the covenant such force, by providing (p. 38): "The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency or receivership proceedings or against any assignee or trustee for the benefit of creditors." But the claimant has always conceded that this clause does not assist the provability of the claim (Opinion of the Court, p. 81). The creditors who had claims on November 7 have a right to the disallowance of this claim unless its own merits, apart from that clause, equitably entitle it to share in the distribution upon an equal footing with them.

The lessor's rights, then, are limited by the covenants on page 37, accelerating the rent in case of default and entry.

The lessor must take the lessee's obligations as it finds them on the date of insolvency. It may not enlarge them by its own acts after the insolvent estate is in the possession of the Court.

This rule is of general application in equity. It is the basis of the bankruptcy decisions like *Slocum* v. *Soliday,* for if it were equitable to allow proof of a claim for damages on account of the lessee's failure to pay future rents when the default and entry occur after bankruptcy, there is sufficient authority for allowing it in section 63*a* (4), permitting proof of debts founded upon an express contract.

It underlies the spirit and purpose of the Bankrupt Act.

Zavelo v. *Reeves,* 227 U.S. 625, 631.

It is the basis of the insurance decisions. Except for this principle, if an insured under a life policy should die, or even commit suicide, after the date of insolvency, his beneficiary's claim for the face of the policy would rank with the company's debts.

It underlies the decision in *Bowditch* v. *Raymond,* 146 Mass. 109, and is the foundation of the decision in *Matter of Hevenor,* 144 N.Y. 271, that a lessor's claim, based upon his subsequent entry, "could not be intended to be secured by a deed of assignment, and if the assignor so declared in the deed of assignment it would be void."

It was asserted by referee Hotchkiss in *Re Colligнon,* 4 Amer. Bankr. Rep. 250:

> "The debt of a lessee to his lessor arising out of re-entry after bankruptcy is a new debt due to new acts on the landlord's part which should not be recognized to the detriment of other creditors."

The rule that a party may not enlarge his own rights in an insolvent estate by his own acts after the insolvency is a corollary to the rule that he may not contract for an advantage in the event of insolvency. Such a contract, to take effect upon insolvency, is void.

For example, a contract between a creditor and his debtor—that if the debtor should become insolvent, the whole consideration, payable in instalments out of royalties, should become immediately due, and the whole of the royalties might be retained by the creditor as security—was held void in—

Ex parte Mackay, 8 Ch. App. 643.

So in—

Ex parte Jay, 14 Ch. D. 19—

a lease from the owner of land to the builder contained a stipulation that in case of default by the lessee, or his bankruptcy or insolvency, all plant and materials on the premises should belong to the lessor. Before any default the lessee was adjudicated a bankrupt. The Court held the stipulation void as against public policy.

In *Ex parte Barter,* 26 Ch. D. 510, the same result was reached under a contract for building a ship.

On the other hand, when a similar stipulation took effect upon default, and the builder subsequently went into bankruptcy, the stipulation was held valid, and the lessor retained the plant and materials against the trustee.

Ex parte Newitt, 16 Ch. D. 522.

So in the present case we concede that if the lessor's rights to accelerated rent arose upon his entry and election prior to receivership, they would constitute a provable claim, but we assert that when they can arise only after or in consequence of insolvency the claim is essentially inequitable.

On the other hand, when the acceleration took effect before bankruptcy, and did not depend upon the fact of bankruptcy, such a provision has been held valid.

In re Miller Bros. Grocery Co., 208 Fed. 573 (D.C. N.D. Ohio).

Compare *United Shoe Mach. Co.* v. *Abbott,* 158 Fed. 762 (C.C.A. 8th), with—

Re Jorolemon-Oliver Co., 213 Fed. 625 (C.C.A. 2d).

In re Hoskins, 1 Ontario App. 379, is squarely in point. A lease for ten years contained the provision that in the event of the lessee's insolvency the term was immediately to become forfeited and void, but the next succeeding current year's rent was nevertheless to be at once due and payable. The Court held that this provision was void as being a fraud on the Insolvent Act, and that the lessor could not prove any claim for the next succeeding current year's rent. The Court said:

> "As between lessor and lessee the second year's rent became due and payable. This was a provision for liquidated damages for the loss involved in the landlord's having to resume possession of the premises. As between the parties it created a legal debt. Regarded however from the creditors' point of view, the effect of the insolvency is to divert from the general creditors so much of the assets for which no value is received either by the insolvent or his general creditors."

Therefore, if the lease in the present case expressly provided as follows—"If the lessee becomes insolvent, the lessor may enter and take back the premises. The lessee in that event shall forthwith be liable for all future payments which would become due if the lease should continue throughout its term less the estimated rental value of the premises for the remainder of the term. The amount of such accelerated payments shall be entitled to rank equally with obligations for which the lessee was liable before its insolvency"—yet this provision as to ranking the accelerations with pre-existing obligations would be void.

It is a curious result for which the appellant contends that the rule in equity, in the absence of statute, should be one which, if expressed in the lease, would be held void.

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